United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

305

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

ARTHUR I. WASKOW, Appellant v. ASSOCIATED PRESS and . THE EVENING STAR NEWSPAPER COMPANY Appellees	)	No. 71-1109

On Appeal from the United States
District Court for the District
of Columbia

BRIEF FOR APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ARTHUR I. WASKOW,	)	
	)	
Appellant	)	
	)	
v.	)	No. 71-1109
	)	
ASSOCIATED PRESS, et al.	)	
	)	
Appellees	)	

BRIEF FOR APPELLANT

ISSUES PRESENTED

1. Whether a jury could find knowledge or reckless disregard of the truth when a newspaper, after admitting publication of a libel per se, subsequently undertook separate distribution of the same false story, without making any effort to warn readers of its libelous nature.

2. Whether a jury could find reckless disregard of the truth by a newspaper when

(a) The libelous story concerned a local figure, and was reviewed, researched, and rewritten by the paper's Principal Assistant City Editor;

(b) the Principal Assistant City Editor knew the libeled person by name, knew his employment, and was familiar with his public activities;

(c) the Principal Assistant City Editor examined the paper's special file on the libeled person, and that file revealed the falseness of the libel; and

(d) after being advised of its error, the newspaper took inadequate steps to correct the libel and even continued its publication without warning to readers.

3. Whether a jury could find reckless disregard of the truth when a wire service editor, despite having the correct facts before him, rewrote a story in such a way as to make it libelous per se.

4. Whether it is tortious for news media--having libeled a person and enjoyed the protection of New York Times v. Sullivan--to willfully refuse to make a good faith effort to correct their libelous story.

5. Whether the trial court committed reversible error by misstating material facts and by drawing inferences favorable to the parties seeking summary judgment.

* * * *

This case has not previously been before this Court.

REFERENCES TO PARTIES AND RULINGS

The Opinion of the District Court was written by Hon. William B. Bryant. It was filed on December 11, 1970, and appears at JA 81.

STATEMENT OF THE CASE

The Nature of the Case

This is a civil action for libel per se. Defendants Associated Press and Washington Evening Star falsely reported that Plaintiff Waskow was a convicted felon under sentence of two years in prison and a $5,000 fine. Dr. Waskow relied on two grounds, first, that the Defendants had published the libel in reckless disregard of the truth and, second, that the Defendants had subsequently acted tortiously by willfully refusing to make a good faith effort to ensure adequate correction of their libelous stories. The trial court granted summary judgment for the Defendants.

Statement of Facts

The Associated Press sent out a story over its wire service on September 13, 1968, stating as a fact that Dr. Arthur Waskow was a convicted felon under sentence of two years in prison and a fine of $5,000. (JA 62-63) The same day, the Evening Star published a similar story, also stating as a fact that Dr. Waskow was a convicted felon under sentence of two years in prison and a fine of $5,000. (JA 69)

Both the AP and the Star have admitted that these statements were false. (JA 66,70)

The libelous stories originated in an accurate report in the Baltimore Sun on the morning of the same day. This report related to Dr. Waskow's draft relcassification from IV-F to I-A at the age of 34, his appearance at his draft board to

challenge the reclassification, and his request that the members of the board resign their positions in protest against the war in Vietnam. The Sun article also indicated that Dr. Waskow had previously participated in a protest at the Justice Department with a group that included Dr. Benjamin Spock, Rev. William Sloane Coffin, and Mitchell Goodman. It noted further that Spock, Coffin, and Goodman had recently been convicted of aiding and counseling violations of the draft. The story in the Sun did not say that Dr. Waskow had been convicted of that or any other crime. (JA 61)

Although he had the correct facts before him in the Sun article, Mr. Randolph C. Arndt, a member of the AP's Baltimore Bureau, rewrote the Sun story to say that Dr. Waskow had been found guilty along with Spock, Coffin, and Goodman. (JA 46-47) Thus, where the Sun had referred to "All three" men as having been convicted, Mr. Arndt wrote that Dr. Waskow was "one of the four" men appealing conviction. (JA 61-63)

This libelous story was then sent out over the AP wire. When it was received by the Star, the story was given to Mr. Philip Robbins, who has had over 23 years' experience as a newspaperman, and who was serving as the Star's Principal Assistant City Editor in Dr. Waskow's home city. (JA 54-55) Mr. Robbins knew Dr. Waskow by name, knew his employment, and was familiar with many of his public activities. (JA 55)

Supplementing his previous familiarity with Dr. Waskow, Mr. Robbins went through the Star's special file on Dr. Waskow

in order to add background information about him to the story. (JA 54-55) This file revealed no involvement of Dr. Waskow in the Spock trial. (JA 88) According to the Opinion of the court below, Robbins was not thereby put on notice of the error, because he merely "leafed through" this file, making a "quick" and a "hurried" review of it, and "quickly gathered" information from it. (JA 88-89) However, none of these four phrases appears in the record of the case. Robbins himself said simply that he obtained additional information "from the Star's clipping file on Dr. Waskow. . ." (JA 55) There is no mention whatsoever in his affidavit or elsewhere in the record that Mr. Robbins acted in haste.

The court below also states that Mr. Robbins' "express purpose" was to find information that would "localize" the story, and the court comments that "No facts of record contradict the statement in Mr. Robbins' affidavit" that he made only "this limited search." (JA 89) In fact, Mr. Robbins made no reference to either a "limited" or a "localized" search. (JA 55) On the contrary, of the three additions made by Mr. Robbins regarding Dr. Waskow's background, two related not to local, but to national matters--his service as an Alternate Delegate to the Democratic National Convention and his participation in the National Convention for New Politics in Chicago. (JA 55)

Subsequent to publication of the libel by the Star, another of its city editors immediately recognized the error on a single reading, and the Star published a "correction." (JA 58) However, the original story was 10 column inches long, above the

middle of the page, and carried a dramatic, six-word, two-line, double-column headline in 30-point type. (JA 69) The correction, on the other hand, was a single column, only 3 inches long, at the very bottom of the page, and was headed by the single word "Correction" in only 12-point type.[1/] (JA 70)

The Star rejected demands by counsel for Dr. Waskow that a correction be published "with the same prominence that the original story received." (JA 71) Similarly, the AP refused to send its subscribers anything other than a single routine correction, and further refused either to check to ensure that any republications by its subscribers were corrected, or to give Dr. Waskow the names of its subscribers so that he could undertake to make sure that any necessary corrections were made. (JA 76-80)

After having received notice of its erroneous story from both the AP and from counsel for Dr. Waskow, and having acknowledged its own error in the correction, the Star nevertheless carried on further, separate distribution of the erroneous story for an additional two weeks, making no effort to apprise readers that the libelous statement about Dr. Waskow was false. (JA 22-25)

In the court below, Dr. Waskow argued that a jury could

[1/] On the same page is a correction of an advertising error. The advertisement correction is distinctively bordered by a heavy black line, is 12 column inches long, runs across 3 columns, and the word CORRECTION is in 36-point type, all capitals. (JA 70; see also p. 17, infra)

reasonably find that the AP and Star had acted in reckless disregard of the truth in their original publications of the admittedly false story about him, and that the Star acted with actual knowledge of the falsity when it undertook separate distribution after having received notice and having acknolwedged the error. Basing its decision in substantial part on incorrect statements of fact and on inferences favorable to the Defendants (see page 5, supra), the court below granted summary judgment to the Defendants.

Dr. Waskow also argued that the court should recognize as a tort the willful refusal to make a good faith effort to ensure adequate correction of a libelous story (thereby filling the gap in the law created by N.Y. Times v. Sullivan). The court below rejected this argument without analysis. (JA 89) It also found the Defendants' efforts to have been adequate in fact, thereby depriving Plaintiff of his jury on that issue as well. (JA 90)

The trial court made no finding--indeed, no reference at all--to the separate distribution made by the Star after it had acknowledged its error.

ARGUMENT

I. The trial court erroneously granted summary judgment by misstating material facts, by drawing inferences favorable to the parties seeking summary judgment, and by failing to rule at all on a material issue, thereby depriving Dr. Waskow of his right to trial by jury on substantial issues of fact.

"On summary judgment the inferences to be drawn from the underlying facts contained in [the supporting] materials must be viewed in the light most favorable to the party opposing the motion." Menard v. Mitchell, _____U.S. App. D.C. _____, _____, _____F.2d_____ (No. 22, 530, June 19, 1970), citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Adickes v. S.H Kress & Co., _____U.S. _____, 38 U.S.L.W. 4435, 4437-39 (1970).

As noted by this Court in Washington Post Co. v. Keogh, 125 U.S. App. D.C. 32, 365 F.2d 965, 967 (1966), cert. denied 385 U.S. 1011 (1967), in a motion for summary judgment "the right of trial by jury is at stake." Accordingly, summary judgment must be denied if there is even a "doubt" whether an issue of fact has been raised by the plaintiff. Keogh at 967. See also Wasserman v. Time, Inc., _____U.S. App. D.C. _____, _____ F.2d_____ (No. 23,267, March 3, 1970).[2/] The Supreme Court

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[2/] Summary judgment was affirmed in Keogh only because the plaintiff there failed to make an effective tender of any evidence whatsoever bearing upon reckless disregard. (at pp. 976, 970-971) The test of "convincing clarity" is to be applied, as in N.Y. Times v. Sullivan, 376 U.S. 254(1964), after all the evidence has been presented at trial, not on a motion for summary judgment. Cf. Wasserman, supra; Keogh, supra.

has stated the applicable rule with black-letter clarity:

> Where either result finds reasonable support in the record it is for the jury not for this Court to determine whether there was knowing or reckless disregard." Time, Inc. v. Hill, 385 U.S. 374, 87 S. Ct. 534, n. 11 (1967).[3]

Thus, combining the procedural and substantive law applicable to summary judgment in libel cases, the question is: Viewing the pretrial evidence most favorably to Dr. Waskow, is there "reasonable support" for a "doubt" in his favor on the issue of knowledge or reckless disregard? In short, is there a question for the jury?

A. A jury could reasonably find reckless disregard of the truth, because the Star's Principal Assistant City Editor actually examined the Star's special file on Dr. Waskow in the course of rewriting the libelous story, and that file necessarily revealed the falseness of the patently injurious allegation about him.

The New York Times case calls not for "blind application" of a rule of press privilege, but for consideration of the "particular context" of each case. New York Times v. Sullivan, 376 U.S. 254 (1964); Time, Inc. v. Hill, 385 U.S. at 390; Curtis Publishing Co. v. Butts, 388 U.S. 130, 148 (1967).

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[3] It is in the light of this rule that two judges of our Court of Appeals have said that summary judgment turns on a finding by the court as to whether the plaintiff can prove actual malice in the Times sense. Wasserman, supra, Slip Opin. at p. 4. That is, the court must find only that a jury could reasonably find malice or reckless disregard.

"It is the conduct element. . . on which we must principally focus. . ." Curtis Publishing Co. at 153. Here the Defendant's conduct is compellingly different from that of the defendant in N.Y. Times.

Most importantly, the Court in N.Y. Times found that the "mere presence" of the correct information somewhere in the Times' vast clipping files did not establish that a particular person at the Times who had responsibility acted in reckless disregard of the truth. N.Y. Times, 376 U.S. at 287. It is obvious from this language, however, that if a responsible person had actually examined the particular file that revealed the error, the "conduct element" would have been significantly different. And that is precisely what happened in the present case.

Here the telltale clipping file did not lie unexplored and uncommunicative. It was actively examined--and not by any mere copy boy, but by the Principal Assistant City Editor of Defendant Evening Star. (JA 54-55) In addition, the Principal Assistant City Editor took pains to cull three separate items for inclusion in his own rewrite of the libelous story, and put two of those items into the very sentence that contained the libelous statement. (JA 62-63)

The Supreme Court has focused upon another major aspect of factual context that is of crucial significance here--whether the particular injurious statement is such that it "affords. . . warning of prospective harm to another through falsity."

Time, Inc. v. Hill, 385 U.S. at 389. It is not necessary of course, to verify the accuracy of "every reference" to a name. Ibid. There is an obligation, however, to verify the most patent and severe of libels, the charge of conviction of a felony, and especially when the responsibly person has the tell-tale file in his hands and is actively scrutinizing it to make selections from it.

Principal Assistant City Editor Robbins protests in his affidavit that he did not know that the libel was false (JA 55), but this does not "automatically insure a favorable verdict." St. Amant v. Thompson, 390 U.S. 727, 732 (1968) The question of his good faith is still one that must be determined by the finder of fact. Ibid. In making that determination in this case, the jury can properly consider that Dr. Waskow is prominent in the very community served by the Star and that Mr. Robbins knew him by name, knew his employment, and knew of his public activities. (JA 55) Mr. Robbins contends that he could not name all of the defendants in the Spock case. But the point is not whether he knew who was a defendant in Spock, but whether the Principal Assistant City Editor could be expected to know that a particular prominent person in his own city was not a defendant in that notorious case. For example, he must have known that Bruce Terris of this city was not a defendant in Spock. He must have known that Marion Barry of this city was not a defendant in Spock. He must have known that Ralph Temple of this city was not a defendant in Spock. And a jury could

certainly find that the Washington Star's Principal Assistant City Editor must have known that Dr. Arthur Waskow of this city was not a defendant in Spock, particularly after he had just examined his paper's special clipping file on Dr. Waskow. Significantly, an Assistant City Editor on the Evening Star was able to detect the error merely by reading the libelous article. (JA 58)

The importance of Mr. Robbins' examination of the Star's clipping file on Dr. Waskow is manifest in comparison with the following holding:

> In this case there is a complete absence of any indication that the writer had any suspicion of the falsity of the statements made by him, and there is a total lack of proof that he had before him any contra-indications as to the correctness of his conclusions. Time, Inc. v. McLaney, 406 F.2d 565, 573 (5th Cir.), cert. denied, 395 U.S. 922 (1969) (emphasis added).

In the present case, on the other hand, there is no such "total lack of proof" that the responsible editor "had before him" any information contrary to the false statement. On the contrary, such proof is abundantly evident in the commendably candid Affidavit of Principal Assistant City Editor Robbins.

Thus we have here evidence of a "particular context" and a "conduct element" vastly different from the "mere presence" of data in the files, as in N.Y. Times v. Sullivan. This evidence is more than sufficient to raise a "doubt" in Plaintiff's favor and to provide "reasonable support" for a jury determination that the Star acted in reckless disregard of the truth.

The trial court avoided this conclusion by misstating material facts and by drawing inferences favorable to the Defendants:

> ". . . Mr. Robbins' review of the completed story was a [1] hurried one. He [2] leafed through a file containing a substantial collection of newspaper clippings, all relating to public activities of Dr. Waskow. His [3] express purpose was to find information which would [4] localize the story, since Waskow resided in Washington. [5] No facts in this record contradict the statement in Mr. Robbins' affidavit that he made only this limited search." (JA 88-89) (emphasis added)

The phrases numbered [1] and [2] in the foregoing passage do not appear in Mr. Robbins' affidavit. They represent inferences by the trial court with which a jury could properly disagree. (See JA 55) Phrase [3] is flatly wrong. Mr. Robbins expressed no such purpose. (See JA 55) Phrase [4] is equally incorrect. Mr. Robbins said nothing about "localizing" the story. In fact, two of the three background items that he added were of national, not local, significance. (See JA 55) The conclusory sentence numbered [5] is clearly erroneous for all of the foregoing reasons.

A trial is clearly required in this case under the recent decision of the Supreme Court in Ocala Star-Banner Co. v. Damron, _____U.S._____, 39 U.S.L.W. 4268 (2/23/71). There, over the dissent of two Justices, the Court remanded the case for a trial on facts similar to, but far less compelling, than those in the present case. See 39 U.S.L.W. at 4275 (Justices Black and Douglas dissenting).

In Ocala Star-Banner, the paper had printed an erroneous story that the mayor of Chrystal City, Leonard Damron, had been charged with perjury (though not convicted). In fact, the person so charged had been Leonard's brother, James. The paper's explanation suggested far more justification than any put forth in the present case. The area editor in Ocala Star-Banner had been working for the paper for less than a month, and had never heard of James Damron. Accordingly, when the story came in about James Damron, the editor "inadvertently changed the name" to the one with which he was familiar. 30 U.S.L.W. at 4269.

These facts, of course, are far short of those in the present case in making out reckless disregard of the truth. Here Mr. Robbins was the Principal Assistant City Editor and knew Dr. Waskow by name, and there is no confusing similarity of names. Yet in Ocala Star-Banner, the Supreme Court remanded the case for a jury trial on the issue of reckless disregard of the truth. There can be no doubt, therefore, that remand for trial is necessary in the present case on same issue.

B. A jury could reasonably find that the Star acted maliciously, because (1) the "correction" it published was manifestly inferior, both in size and prominence, to the story containing the libel, and (2) the Star continued to make the libelous story available for sale, without making any effort to warn its readers of the libel, even after it had admitted its error.

Despite demands by counsel for Plaintiff, the Star refused to publish a reasonably adequate correction. (See JA 71-76) Rather, the Star chose to stand upon a patently inadequate "correction" that it had published two days after the libel. (JA 70) A comparison of the libelous story with the correction is quite striking. (See JA 69, 70) Both the libel and the correction appeared on page A-2 of the Evening Star. From there, all similarity ends.

The libelous story consists of 10 column inches. The correction is only 3 column inches.

The libelous story is in a relatively prominent place, above the middle of the page. The correction is in the most obscure possible place on the page.

The libelous story carries a dramatic, six-word, two-line, double-column headline in 30-point type. The correction is headed by the single, undramatic word "Correction" in only 12-point type.

In short, the libelous story is presented in such a way as to catch the average reader's attention. The correction is presented in such a way as to elude all but the careful searcher.

There is yet another striking contrast. On the very same page on which it published the inadequate correction of its libelous story about Plaintiff, Defendant Evening Star published a correction of another error, this one having been made in an earlier advertisement--and that correction shows what Defendant is capable of doing when it really wants to make a good faith correction. The advertising correction is 12 column inches. It runs across 3 columns. The word CORRECTION is in 36-point type, and it is in all capital letters. In addition, the advertising correction is in a more prominent place in the paper than the error had been (since the original ad was on page A-12 rather than A-2), and the advertising correction is distinctively bordered by a heavy black line.

In effect, therefore, Defendant Star has provided in its advertisement correction an excellent standard or model of a good faith effort to make amends. That standard has not been met, or even approached, in the correction of the libel about Plaintiff. The essential contrast in the two corrections is strikingly apparent on the following page. (See also JA 69, 70)

Correction

An Associated Press story in Friday's Star erroneously reported that Arthur I. Waskow, who is fighting induction by a Baltimore draft board, was among those convicted in Boston for conspiring to aid and counsel draft law violations.

Waskow was not a defendant in Boston. The AP dispatch had incorrectly listed him along with the defendants, Dr. Benjamin Spock, Yale Chaplain William Sloane Coffin and writer Mitchell Goodman. The main point of Friday's news story was that Waskow asked members of Local Board No. 20 to resign "rather than continue to conscript men for an unconstitutional, illegal, immoral and ob[illegible]

These facts bear heavily upon the question of malice. ". . . Of course, a refusal to retract when a request has been made may be evidence in favor of the plaintiff, tending to show malevolence or an improper purpose in the original publication." Prosser, Torts 826-827 (3d ed., 1964). Nor is just any "correction" held to be a satisfactory one. A retraction must be an "honest endeavor" to repair "all of the wrong" done by the libel. It must, in general, be given "the same publicity and prominence" as the libelous story. Prosser, Torts 827 (3d ed., 1964).

This hornbook rule was adopted by clear implication in N.Y. Times. There the Supreme Court did not accept the absence of a retraction as evidence of malice, but, significantly, the Court's reason was not that no such inference is ever justified. Indeed, in N.Y. Times the Court took pains to note two distinct reasons for not relying on the lack of a retraction: (1) The Times expressed a reasonable doubt as to whether the charges in question could reasonably have been taken to refer to the plaintiff, and (2) The Times never made a final refusal to publish a retraction, but merely asked for further information about the alleged libel. N.Y. Times, 376 U.S. at 286. Obviously, neither of these crucial factors is present in the instant case.

Thus, from the Defendant Star's high-handed and unjustified refusal to make a good faith correction of an admitted defamatory falsehood, the jury would be able to infer malice in the original publication.

Moreover, that inference is especially compelling in the present case, because it is significantly reinforced by other malicious conduct on the part of Defendant Star. For at least two weeks after conceding its libelous error, Defendant Star continued to offer the paper containing the libelous story for sale, without making any effort to warn purchasers of the defamatory falsehood. (JA 22-25) How many such papers were actually sold (a fact uniquely in the possession of Defendant Star) does not appear in the record, and is immaterial. The significant fact, from which a jury could reasonably infer malice, is once again the "conduct element"--the don't-give-a-damn behavior of Defendant Star regarding the injury it had caused by its admitted libel of Plaintiff's reputation.[4/]

C. A jury could unquestionably find that the Star's subsequent republication of the libel, after having admitted its error, was done in reckless disregard--indeed, with full knowledge--of the truth.

This proposition is too clear for argument, and Defendant Star did not dispute it below. Instead, recognizing that any First Amendment privilege was stripped away by knowledge of falseness, the Star sought new shelter in even more dubious contentions.

[4/] Evidence bearing upon a defendant's "general course of conduct" toward the plaintiff, including conduct subsequent to the defamation, is admissible "to prove malice inferentially." Liquid Veneer Corp. v. Smuckler, 90 F.2d 196, 204 (1937); Washington Annapolis Hotel Co. v. Riddle, 83 U.S. App. D.C. 288, 292, 171 F.2d 732 (1948); Hartman v. Time, Inc., 64 F. Supp. 671 (E.D. Pa. 1946), modified in part, 166 F.2d 127 (3d Cir. 1948), cert. denied, 334 U.S. 838 (1948).

First, they argued that Dr. Waskow has not brought forth any particular purchaser. To do so, however, would be unique in a case of unambiguous libel per se. When the statement at issue is ambiguous (unlike the present case), readers may indeed be necessary as witnesses to prove reasonable inference of defamation. However, the fact that there was publication can always be reasonably inferred from the fact that the newspaper was offered for sale to the general public--and that fact has been admitted by the Star. (See JA 22-25) Moreover, if the inference of actual publication is unfounded, Defendant Star is uniquely able to come forward (as it has not done) with proof from its own records that no copies of the defamatory issue were subsequently sold.

In fact, however, the Star's next contention belied the first. They argued that there really were relatively few such sales, so that Dr. Waskow has not been libeled to a particularly large audience. Although this may be a legitimate point with respect to the amount of damages recoverable, it hardly justifies summary judgment on the merits.

The Star also attempted to make Plaintiff's position appear absurd by arguing the impracticality of entirely cutting off all subsequent distribution and fully removing all copies from libraries, etc. This, however, was never suggested by Plaintiff. Rather, his complaint is that the Star put additional copies of the libel into circulation, without even troubling to

mark those copies in such a way as to give warning of the libel.[5/]

Finally, the Star raised below the clearly misplaced defense of the so-called "single publication rule." That rule, of course, is that publication of a particular issue of a newspaper "gives rise to but one cause of action."[6/] But one cause of action is all that Dr. Waskow is here asserting. For Dr. Waskow, on this issue, is assuming arguendo that the original publication was privileged because of lack of malice or reckless disregard. If that is so, then by definition there was no tort in the original publication. Prosser, Torts §16, text and n. 1 (3d ed., 1964). On the Star's own view, therefore, the sale of back issues with knowledge of falseness was the first and only libelous publication by Defendant Star.[7/]

The Star's reliance on Statute of Limitations cases (at p. 22 of their Memorandum below) is also misplaced. To reject the

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5/Since Defendants characterize the number of such copies as "virtually de minimis," there could have been no great hardship or expense involved in marking the copies with an appropriate correction or warning.

6/Defendant's Memorandum below at 21, quoting Ogden v. Association, 177 F. Supp. 498 (D.C. D.C. 1959). Defendants rely, strangely, upon the Uniform Single Publication Act, Unif. Laws Ann. 9C, p. 173. The very words of that Act, however, clearly give the game away: "Section 1. No person shall have more than one cause of action for damages for libel. . . "

7/The Star insists that the subsequent sales were not made "through usual distribution sources"--a fact that serves to emphasize that the subsequent publication was separate and distinct from the original one. (See JA 25)

single publication rule in such cases would mean that "the Statute of Limitations would never toll." Means v. MacFadden Publication, Inc., 25 F. Supp. 993, 995 (S.D.N.Y. 1939). On the other hand, to adopt that rule in a case such as the present one would mean that once a defendant has published a single defamatory statement about a plaintiff without malice or knowledge, he is forever thereafter privileged to libel the plaintiff with the same defamation--even with malice. The single publication rule has never been applied to produce such a preposterous result.

Thus, assuming there was no libel committed by the Star in the original publication (because of privilege and lack of knowledge of the truth), a jury unquestionably could find that a libel was committed by the Star--with full and admitted knowledge, and therefore with no privilege--when it subsequently distributed the false charge that Plaintiff is a convicted felon facing two years in a federal penitentiary.

The trial court did not adopt Defendant Star's contentions on this issue. The court simply ignored the relevant facts altogether, although the issue was fully briefed and argued at the hearing below.

D. A jury could reasonably find that the Associated Press acted maliciously, i.e., in reckless disregard of the truth, because (1) the AP editor who initiated the libel had the true facts before him at the time; (2) the libelous statement gave clear warning on its face of prospective harm through falsity; and (3) the Associated Press refused Plaintiff's request that it take reasonable steps to assure that the libel would be corrected by its subscribers.

The critical factors in determining malice are the factual context of the case and the defendant's conduct. See Sections IA and IB, supra; Time, Inc. v. Hill, supra; Curtis Publishing Co. v. Butts, supra. Malice can be inferred from a defendant's "general course of conduct," including his actions subsequent to the defamation. Liquid Veneer Corp. v. Smuckler, supra; Washington Annapolis Hotel Co. v. Riddle, supra; Hartman v. Time, Inc., supra. Specifically, a refusal to make an "honest endeavor" to effectively retract or correct the libel is evidence of malice. Prosser, Torts, supra; N.Y. Times v. Sullivan, supra.

In the present case, Defendant Associated Press sent out a single teletype correction to each subscriber, which might or might not have been heard and heeded. (JA 78-80) The AP refused to ascertain that each subscriber who had printed the libelous story had printed a correction. (JA 76-80) It even refused to make a list of its subscribers available to Dr. Waskow so that he could undertake to make sure that necessary corrections had

been made. (JA 76-80) From this lack of "honest endeavor" to make amends, a jury can find malice. Prosser, Torts, supra; N.Y. Times, supra.

In addition, this conduct on the part of the Associated Press must be taken in factual context. The libelous statement gave the clearest warning on its face of prospective harm through falsity. Cf. Time, Inc. v. Hill, supra. Further, the libelous statement was not "hot news," "news which required immediate dissemination," or an essential part of a current story. Cf. Curtis Publishing Co. v. Butts, 388 U.S. at 157, 158. As Defendants conceded in their Memorandum below at p. 15, the libel of Plaintiff's reputation was, in the context of the current news report, merely an "incidental fact"--a "fact" that could readily have been left out of the story with no injury whatsoever to Defendants' interest in disseminating current news.[8/] Clearly, therefore, any First Amendment privilege Defendants might have to destroy reputations is at its nadir in the context of this case.

Defendants further urged below, however, that our political system is premised upon robust debate, strongly-asserted opinions, and fair comment. So it is. But the libel in the present case involves none of these. On the contrary, Defendants stated

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[8/] Defendant Star makes a similar admission in its published "correction," i.e., that the libelous statement about Plaintiff was not "the main point" of the news story.

flatly as a matter of fact that Plaintiff was a convicted felon facing two years in a federal penitentiary. The critical difference between "factual assertions" and that which is "merely comment" or "fair comment" has been recognized in libel cases, both in the Supreme Court and in this Circuit. See, e.g., Garrison v. Louisiana, 379 U.S. 64, 76 n. 10; De Savitsch v. Patterson, 81 U.S. App. D.C. 358, 359-360, 159 F.2d 15(1946) (reversing summary judgment in a libel case); Washington Times Co. v. Bonner, 66 U.S. App. D.C. 280, 285-287, 86 F.2d 836 (1936). The question of reckless disregard must go to the jury, therefore, when the defendant has the correct facts before him but goes beyond fair comment by misstating those facts. Pape v. Time, Inc., 354 F.2d 558 (7th Cir. 1965), cert. denied, 384 U.S. 909.9/

In the present case the Associated Press has admitted that its editor had the correct facts before him but nevertheless misstated those facts. (JA 46-47) Therefore, whether the editor "had no reason to doubt" his libelous story (as is asserted in his self-serving Affidavit at JA 47) is not for him to decide, but for the jury. St. Amant v. Thompson, 390 U.S. at 732.

9/ The facts before the AP editor were not "extravagantly ambiguous," rendering it "impossible [for him] to know" what was meant. Time, Inc. v. Pape, _____U.S._____, 39 U.S.L.W. 4270, 4273. On the contrary, it was necessary for the AP editor to change the story to say that Dr. Waskow was "one of the four men" appealing conviction, whereas the correct story referred to Spock, Coffin, and Goodman as "All three" of those convicted. (JA 61-63; emphasis added)

A jury question has therefore been clearly presented as to whether the Associated Press acted maliciously or in reckless disregard of the truth when it libeled Dr. Waskow.

The trial court's decision to the contrary was based on a misunderstanding of the word "malice" under the N. Y. Times test. (See JA 86-87) Thus, the trial court was persuaded by the fact that no employee of AP knew Dr. Waskow personally or "would want to libel" him. (JA 87) The Supreme Court has flatly rejected such an interpretation:

> "But ill will toward the plaintiff, or bad motive, are not elements of the New York Times standard. That standard requires only that the plaintiff prove knowing or reckless falsity. That burden, and no more, is the plaintiff's. . ." Rosenbloom v. Metromedia, _____U.S._____, 39 U.S.L.W. 4694, 4702, n. 18 (6/8/71).

It is that burden that Dr. Waskow has a right to assume before a jury in the court below.

II. Even assuming that Defendants were privileged to defame Plaintiff with impunity in the course of disseminating news, the Defendants should nevertheless be held responsible for their subsequent abuse of the enormous powers of the news media in wilfully refusing to make a good faith effort to correct their libelous story.

Before the trial court, Plaintiff proposed that the court recognize a tort that may be stated as follows: A defendant may be held liable for damages when a jury reasonably finds (1) that he has published a statement of fact about the plaintiff that is (a)false, (b) injurious to reputation, but (c) privileged; (2) that the plaintiff has submitted to the defendant clear and

convincing proof that the statement is false; (3) that the plaintiff has requested an adequate retraction or correction; and (4) that the defendant has willfully refused to make a good faith effort to take steps reasonably calculated to remedy the defamation (for example, by publishing a correction that is comparable to the defamatory item in prominence, i.e., location, size, headline, etc.)

The trial court gave no reason at all for summarily rejecting such a tort. (JA 89) However, the court did state that it would be "simply unreasonable" to require publication of a retraction of comparable prominence with the defamation. This factual conclusion is supported by no evidence submitted by either Defendant in this case.

However, representing a group of plaintiffs in another case involving injury to reputation, counsel for the AP have made the identical demand as Dr. Waskow has made here, i.e., that an appropriate notice be published in a place of "equal prominence." See The Washingtonian, June, 1971, p. 45. In addition, James J. Kilpatrick, writing in the Star, has expressed the same idea:

> "False statements can damage individual reputations, and we know it. Granted this new freedom [i.e., that of the N.Y. Times line of cases], we must bend over backward, I think, publicly to correct our errors, to publish retractions. . ." The Sunday Star, June 20, 1971, p.B1.

Moreover, the same obligation has been recognized editorially by the Washington Post:

> "With the development of monopoly ownership of newspapers and broadcasting stations in many American cities, publishers and broadcasters have become immensely powerful. Powerless individuals who are wronged by them not through malice but as a result of inadvertence or carelessness must have some effective remedy; and if a fear of this remedy imposes a measure of self-censorship--a pejorative term for self-control or responsibility--we cannot see the result as necessarily ruinous. A free press can find the resources to rise above this threat. The community, after all, has a vital interest in fairness as well as in freedom." The Washington Post, June 10, 1971, ed. p.

Thus the Post recommends the imposition of a duty to make "a good faith effort by a newspaper. . .to correct injurious error when it is discovered":

> ". . .Appropriate to this problem is a good faith effort by a newspaper. . . to correct injurious error when it is discovered. Such an effort is an obligation of freedom. When it is made candidly and generously, it can go far toward undoing and healing an injury. We think, therefore, that it ought to serve as an earnest of good faith and as a shield against legal action." Ibid. (emphasis added)

Neither counsel for the AP, nor Mr. Kilpatrick writing in the Star, nor the editors of the Washington Post, concur with the court below that the imposition of such an obligation would be "simply unreasonable."

A. The proposed tort is reasonable in scope, impairs no First Amendment rights of news media, and imposes no significant burden upon them whatsoever.

It will immediately be recognized that the scope of the proposed tort of willful failure to retract is quite narrow indeed--far narrower, for example, than a general right of access to the press, which has been so persuasively put forth by Professor Jerome A. Barron. See Barron, Access to the Press--A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967); An Emerging First Amendment Right of Access to the Media, 37 Geo. Wash. L. Rev. 487 (1969); Access--the Only Choice for the Media? 48 Tex. L. Rev. 766 (1970). The proposed tort comes into operation only when the defendant has published what would have been defamation prior to the ruling in N.Y. Times, and when he no longer has any legitimate grounds whatsoever for refusing to make a good faith effort to undo the harm he has caused. The defendant must have been clearly and convincingly put on notice of the error. The error must be a matter of fact, not merely of opinion. And the burden placed upon the defendant is minimal, i.e., it occurs in the very few instances in which all of the above criteria have been met, and it permits the defendant to avoid liability entirely, simply by making a good faith effort to right his wrong. At the same time, however, the tort will help to fill the gap created by the fact that our communications industry has become centralized in the hands of a few who operate virtually without legal responsibility or public accountability. Barron, supra, 48 Tex. L. Rev. 766 (1970).

There can be no doubt as to the constitutionality of the proposed tort.[10/] The Supreme Court has gone beyond the needs of the present case in explicitly holding that the First Amendment is not violated by a requirement for reply time on broadcast media to answer personal attacks and political editorials. Red Lion Broadcasting C. v. FCC, 395 U.S. 367, 396 (1969). In fact, the Court has recognized that such a rule serves to "enhance rather than abridge the freedom of speech and press protected by the First Amendment." Red Lion, 395 U.S. at 375. And Red Lion is "not just a broadcast case. It is a media case." Barron, supra, 48 Tex. L. Rev. at 771. Indeed, the Supreme Court has recently given express sanction to the idea of tort liability for failure to publish an appropriate retraction. Rosenbloom v. Metromedia, 39 U.S.L.W. at 4700. In doing so, the Court cites with approval the article by Barron, supra, 80 Harv. L. Rev. at 1666-1678, and the Red Lion case.

Finally, the elements of the proposed tort are abundantly met by the facts in the present case--or so a jury could reasonably find. Both Defendants published a false statement about Dr. Waskow. (JA 69, 70, 22-25, 77-80) That statement, imputing conviction of a felony, is libelous per se. Dr. Waskow informed Defendants of the error. (JA 71, 76) And Defendants accepted this notice as adequate. (JA 22-25, 77-80) Dr. Waskow

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10/ N.Y. Times did not reach this question, expressly because two of the criteria here submitted were not met: the defendant was not given clear and convincing proof that the plaintiff had been defamed, and there was no final refusal to retract by the defendant. N.Y. Times v. Sullivan, 376 U.S. at 729.

repeatedly demanded appropriate retractions or corrections, gave clear and explicit reasons for being dissatisfied with the Defendants' efforts, and offered to cooperate with both Defendants to ensure adequate corrections. (JA 71, 72, 75-78) Both Defendants rejected his demands. (JA 75-80) In addition, the Star did not even respond to Dr. Waskow's offer "to cooperate with any good faith effort" to retract and "to comment on any draft correction" prepared by the Star for this purpose. (JA 75) And the Associated Press rejected Dr. Waskow's request for the names of its subscribers so that Dr. Waskow could himself see that necessary corrections were promptly made. (JA 78) In short, both defendants failed to make good faith efforts to take steps reasonably calculated to remedy the defamation.

B. The proposed tort is founded solidly on values that have been recognized as precious to our society, and it will fill a serious gap that now exists in protecting those values.

"New and nameless torts are being recognized constantly." Prosser, Torts p. 3 (3d ed., 1964) The progress of the common law is marked by "many cases of first impression," in which the court has "struck out boldly to create a new cause of action, where none had been recognized before." Ibid. These axioms of common law tort development have been recognized in practice in this Circuit. See, e.g., Whetzel v. Jess Fisher Management Co., 108 U.S. App. D.C. 385, 282 F.2d 943 (1960); Javins v. First National Realty Co., _____U.S. App. D.C._____, _____F.2d_____ (No. 22,405, 22,406, 22,409, decided May 7, 1970). In Judge

Holtzoff's approving words, "It is in the domain of the law of torts that we find the most potent and vigorous ferment that has been going on for some time and is still in progress." Holtzoff, The Vitality of the Common Law in Our Time, 16 Cath. U. L. Rev. 23, 29 (1966). Interestingly, Judge Holtzoff refers specifically to the still-developing law of libel, strongly suggesting the need to fill the gap left by N.Y. Times with respect to protection of reputation. Ibid., at 32-33.

N.Y. Times v. Sullivan was itself a case of first impression, establishing for the first time that the First Amendment requires a broad privilege on the part of news media to do severe injury to personal reputations through false publications. That decision, however, has left a serious gap in the law, for the Supreme Court has also recognized that the interest in preserving one's good name is also a precious one in our society. Certainly the Court, while holding the First Amendment to be paramount, "does not ignore the important social values that underlie the law of defamation. Society has a pervasive and strong interest in preventing and redressing attacks upon reputation." Rosenblatt v. Baer, 383 U.S. 75, 86 (1966). Indeed, the "right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt" reflects "our basic concept of the essential dignity and worth of every human being--a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself," is entitled to recognition as "a basic of our constitutional system." Rosenblatt v. Baer, 383 U.S. at 92 (Justice Stewart concurring). In addition, a wholly

unbridled press privilege to defame anyone who might speak out on a public issue would itself have a deleterious "chilling effect" on First Amendment rights. See Dombrowski v. Pfister, 380 U.S. 479 (1965).

Thus, although dissemination by news media of information and opinions on questions of public concern is ordinarily a privileged activity, this "does not mean. . . that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others." Curtis Publishing Co. v. Butts, 388 U.S. at 150 (1967). Accordingly, as in any other area of the law, "the scope of the privilege is to be determined by reference to the functions it serves." Rosenblatt v. Baer, 383 U.S. at 85 n. 10. For example, "The privilege of fair report is no broader than the public interest which creates it." Hughes v. Washington Daily News Co., 90 U.S. App. D.C. 155, 193 F.2d 922, 923 (1952).11/

What, then, is the function sought to be served by the N.Y. Times privilege, and what is the resultant scope of that privilege? As the Supreme Court has held, the "thrust of N.Y. Times" is that "when interests in public discussion are particularly strong," as they were in that case, the Constitution limits the protections afforded by the law of defamation. Rosenblatt v. Baer, 383 U.S. at 86. The interests in public

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11/ Cf. Washington Annapolis Hotel Co. v. Riddle, 83 U.S. App. D.C. 288, 294, 171, F.2d 732 (1948), holding that the fact that a speaker is privileged to publish an otherwise defamatory statement where there is an "interest or duty" to do so, does not protect the same speaker in a situation where the "interest or duty" is not present.

discussion to which the Court refers are particularly strong, of course, at the point of time of the public discussion itself, that is, at the time of the publication. Thus the Court has stressed "the necessity for rapid dissemination" of news in applying the N.Y. Times privilege. Curtis Publishing Co. v. Butts, 388 U.S. at 159.

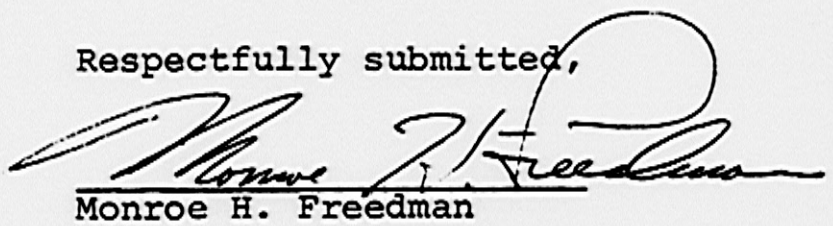
The point of time on which we are now focusing, however, comes well after the necessity for rapid dissemination of news has passed. That is, we are here concerned with a time that comes after the reason for the N.Y. Times rule has been fully served and no longer exists--a time, therefore, at which any rational First Amendment privilege has been entirely exhausted. For there can be no constitutional privilege that will license one who has admittedly smeared another's good name to subsequently refuse to take reasonable steps to make amends through publication of an adequate retraction or correction. A defendant may have a privilege to defame in the context of "hot news," but he does not have a right to refuse to retract in cold blood.[12/]

12/ A jury, of course, could properly find that neither defendant in this case made adequate good faith efforts to correct the admitted libel of Dr. Waskow. See pp. 15-19, 23-24, supra; JA 69-70, 71, 22-25, 76-80.

Conclusion

Accordingly, Appellant Waskow submits that summary judgment was erroneously granted by the court below, and that the decision should be reversed and the case remanded for a trial by jury.

Respectfully submitted,



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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1109

ARTHUR I. WASKOW Nathan J. Paulson
Appellant,

v.

ASSOCIATED PRESS AND THE EVENING STAR NEWSPAPER COMPANY,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE THE EVENING STAR NEWSPAPER COMPANY

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STATEMENT OF ISSUES PRESENTED

1. Did the District Court err in granting summary judgment to a defendant newspaper in a libel case involving a public figure story admittedly subject to *New York Times v. Sullivan* in which uncontroverted affidavits of the paper's editors show they did not perceive the error in the story at the time of publication, solely because (a) one editor looked through a clipping file on the public figure prior to publication or (b) two copies of the edition were sold to the plaintiff's attorney after the newspaper's staff discovered the error?

2. Did the District Court err in granting the defendant newspaper summary judgment on plaintiff's claim that the paper's full and candid correction, published at the paper's own initiative upon discovery of its error and run in its edition of widest circulation on the same page on which the original story appeared, was "inadequate" and thus nullified the protection afforded by the First Amendment?

STATEMENT OF THE CASE

This is a libel action brought by Dr. Arthur I. Waskow, a prolific author, lecturer and social activist, against the Associated Press [hereinafter the AP] and the Evening Star Newspaper Company [hereinafter the Star] seeking compensatory and punitive damages based upon the AP's issuance and the Star's publication of a news article reporting on Dr. Waskow's September 12, 1968, confrontation-type appearance before his draft board in Baltimore. After completion of discovery, both defendants moved for summary judgment as to all of plaintiff's claims, and both motions were granted. Plaintiff appeals from the District Court's decision granting summary judgment to the defendants.

Dr. Waskow has been a resident of the Washington metropolitan area since autumn of 1959, employed first as a legislative assistant to Congressman Robert Kastenmeier of Wisconsin, then as a senior staff member of the Peace

Research Institute, and since 1963 as a Trustee and Resident Fellow of the Institute for Policy Studies (JA 28). He has lectured and spoken extensively at campuses, clubs, and chambers of commerce across the country about the Vietnam War and other subjects (JA 28, 31, 44) and has published at least eight books and forty-nine articles on such subjects as race relations, world peace, radical politics, military strategy, student movements, foreign policy, civil defense, and the future (JA 92-96). Over the past several years, Dr. Waskow has been a member of some twenty-five political, civic, and scholastic organizations, including Resist, Students for a Democratic Society, the Committee for a SANE Nuclear Policy, the New Mobilization Committee to End the War in Vietnam, and the National Conference for New Politics, serving in leadership positions in several of these (JA 35-36, 112). Dr. Waskow served as an Alternate D.C. Delegate to the 1968 Democratic National Convention and is a National Committeeman of the New Party (JA 36-37). In the course of his public activities, Dr. Waskow has often distributed press releases to the news media and has received considerable press coverage (JA 30-31, 34, 37-40, 43-44). In this appeal, Dr. Waskow does not deny that he is a public figure and indeed asserts that he is a "prominent" member of the Washington metropolitan community (Appellant's Brief p. 11).

In September 1967 Dr. Waskow co-authored a tract entitled "A Call to Resist Illegitimate Authority" and, with co-signatories Marcus Raskin, Benjamin Spock, William Sloane Coffin, and Mitchell Goodman, released the same to the press at a press conference in New York City (JA 31-32). In October 1967 Dr. Waskow participated in a mass demonstration at the Department of Justice in which he joined Coffin, Spock, Raskin, Goodman, and several others in presenting to the Assistant Attorney General a briefcase full of draft cards (including his own) turned in by various registrants as an act of protest against the Vietnam War (JA 32-33). Shortly after the government announced its indictment against Spock, Coffin, Goodman, Raskin, and

Michael Ferber, Dr. Waskow addressed another demonstration at the Department of Justice urging that Secretary McNamara, not Dr. Spock *et al.*, should be prosecuted (JA 34). In its appeal brief in the *Spock* case, the government named Dr. Waskow as one of those who participated in a criminal conspiracy with Dr. Spock and the other defendants, indicating that the evidence as to his participation was "substantial" and pointing out that he "accompanied several of defendants to the conference with Department of Justice officials on October 20, he voiced his support of the Resistance" (JA 105-106).

In the spring of 1968, Dr. Waskow was notified that his selective service classification was being changed from IV-F to I-A (J.A. 39). In response to that notification, Dr. Waskow determined to appear before his Baltimore draft board and urge its members to resign *en masse* rather than continue to conscript people into "an illegal war," and he thus prepared and distributed a press release announcing this plan (JA 39). In that press release Dr. Waskow stated that:

> "He was reclassified 'I-A delinquent' last February after turning in his draft card to the Department of Justice on October 20, 1967. He was one of about 500 young men who did so, and was one of the group (including Dr. Benjamin Spock and Rev. William Sloane Coffin, Jr.) that met with the Deputy Assistant Attorney General to explain why they intended to support draft resistance until the war in Vietnam was ended." (JA 113)

On September 12, 1968, Dr. Waskow appeared before his draft board in the Baltimore Customs House and read a prepared statement indicating that his reclassification was clearly punishment for his "symbolic act of opposition to the war involved in handing in my draft cards" and urged the board members "to resign rather than continue to conscript men for an unconstitutional, illegal, immoral, and obscene war in Vietnam" (JA 116-117). After the meeting, Dr. Waskow met with the press in front of the Customs

House, answering questions about the meeting and posing for photographs (JA 40).

As part of its regular operations, the Baltimore Bureau of the AP reviews stories run each day by AP member newspapers in the Baltimore area, selecting certain of these stories for condensation and distribution to other member papers (JA 46). On the morning of September 13, 1968, this function was performed by Randolph C. Arndt of the Baltimore Bureau. Among the stories selected by Mr. Arndt was a *Baltimore Sun* article of that morning describing Dr. Waskow's draft board meeting of the previous day and entitled "Waskow Asks Draft Unit to Quit" (JA 61). The Sun article, referring to Dr. Waskow, stated in part:

> "He was among the teachers and writers who met with Justice Department officials that day. The group included Dr. Benjamin Spock, the pediatrician; the Rev. William Sloane Coffin, chaplain of Yale University, and Mitchell Goodman, the writer.
>
> "4-F Deferment Lifted
>
> "All three were sentenced to two-year jail terms and received $5,000 fines last July 11 on charges of conspiring to aid and counsel violations of the Draft law. They are free on bail pending appeal." (JA 41).

In reading the above quoted passage, Mr. Arndt mistakenly concluded that Dr. Waskow was among the defendants in the *Spock* case, and the story as he rewrote it reflected this belief (JA 41, 46-47). Mr. Arndt's story was reviewed by AP State Editor Daniel Donahue, Jr., who saw nothing wrong with it and thus made no substantive alterations or corrections (JA 41, 53). The story was then issued on the wire that morning so as to be available for use by that day's afternoon papers (JA 41, 53). Neither Mr. Arndt nor Mr. Donahue had any previous knowledge of Dr. Waskow, nor were they aware of the identity of all the defendants in the Spock case (JA 42, 46, 53).

On the same date, the AP story was received at the offices of the Star and selected by Acting State Editor John

Bartgis for insertion in that evening's editions (JA 48). It was then approved by Principal Assistant City Editor Philip Robbins who added to the story four items of information on Dr. Waskow's background which Robbins thought would make the story more interesting to Washington readers and which he obtained from the Star's clipping file on Waskow (JA 54-55). Neither Bartgis nor Robbins was aware at the time of publication that the Star story was erroneous, nor did they perceive in the story any irregularities or indications of possible error (JA 49, 55). After publication of the Waskow story on page A-2 of the Star editions for September 13, 1968, Star Assistant City Editor Boris Weintraub detected the error in the story in the course of reading through the paper and promptly notified his Star superiors and the AP's Baltimore Bureau (JA 58).

On the morning of September 14, 1968, the Baltimore Bureau issued on its local wire a corrective story (JA 65), accompanied by a request to those newspapers which printed the original story to print the correction (JA 42). It also brought the error to the attention of AP's General Desk in New York which (also on the morning of September 14) issued over the two other wires on which the original story had been carried, and to all AP Bureaus, a corrective story (JA 66) accompanied by a request that the same be printed by any newspaper which had printed the original story (JA 50, 52). These actions complied fully with AP's regular procedures with respect to an error (JA 52).

On September 15, 1968, the Star ran the following correction on page A-2 of its Sunday editions in order to reach the largest possible number of Star readers (JA 58, 67):

> "An Associated Press story in Friday's Star erroneously reported that Arthur I. Waskow, who is fighting induction by a Baltimore draft board, was among those convicted in Boston for conspiring to aid and counsel draft law violations.
>
> "Waskow was not a defendant in Boston. The AP dispatch had incorrectly listed him along with

> the defendants, Dr. Benjamin Spock, Yale Chaplain William Sloane Coffin and writer Mitchell Goodman. The main point of Friday's news story was that Waskow asked members of Local Board No. 20 to resign 'rather than continue to conscript men for an unconstitutional, illegal, immoral and obscene war in Vietnam.'"

The foregoing corrective actions of the AP and Star were effected before either party had received from plaintiff a demand for retraction or any other communication respecting the story (JA 43). After demanding that both defendants undertake further corrective steps regarding the original story (JA 71-80), plaintiff filed suit against the AP and the Star on January 2, 1969. Following a fifteen month opportunity for full discovery on all sides, the defendants moved on April 8, 1970, for summary judgment in their favor, accompanying their motion with affidavits of all pertinent personnel involved in publication of the original story and the corrections (JA 46-60). Plaintiff opposed this motion but presented no conflicting affidavits or depositions. After hearing arguments on the merits and taking the matter under advisement for three months, the District Court granted summary judgment as to both defendants and issued a memorandum opinion.

In that opinion, Judge Bryant found that Dr. Waskow was surely a public figure as a result of his purposeful activity amounting to "a thrusting of his personality into the vortex of an important public controversy" and that the only question for the court to resolve was "whether the libel falls within the area of privilege created by [*New York*] *Times v. Sullivan*" (JA 86). Judge Bryant found no genuine issue of fact as to the defendants' lack of "actual malice" in publishing the story (JA 86-89). In particular, he rejected plaintiff's argument that it could be inferred that Star editor Philip Robbins must have known the story was false since he looked through the clipping file on Dr. Waskow before publication, noting that such an inference did not carry the "convincing clarity" which the Supreme

Court and this Court have required of plaintiffs in libel cases which touch on First Amendment freedoms (JA 88-89).

The District Court also rejected plaintiff's argument for establishment of "a new tort" which would impose liability for a publisher's alleged inadequacies in correcting an erroneous statement of fact published without malice and admittedly entitled to *New York Times v. Sullivan* protection. Judge Bryant held that plaintiff had failed to adduce any persuasive reason for departing from "the generally recognized principle that the issuance of a retraction is not required to prevent liability from attaching" and went on to note that, even if the court were disposed to "create" the new tort, such a creation would not aid the plaintiff here since the retractions issued by the AP and the Star were "certainly adequate under the circumstances" (JA 89-90).

On appeal plaintiff admits that his case is governed by principles established in the *New York Times v. Sullivan* line of cases (Appellant's Brief p. 9) but argues that the trial court's application of those principles to the virtually undisputed facts of this case resulted in an erroneous entry of summary judgment, principally for three reasons: (1) the plaintiff is entitled to a full jury trial on the inference that Star editor Robbins, having looked through a clipping file on Dr. Waskow, must have realized that Dr. Waskow was *not* a defendant in the *Spock* case, despite his sworn testimony to the contrary (Appellant's Brief p. 12); (2) that sale of any back copies of the newspaper after discovery of the error would constitute "publication with knowledge of falsity" in the *New York Times* sense and thus subject the Star to liability (Appellant's Brief p. 19); and (3) that the Constitutional protection afforded the Star by the *New York Times* rule should be nullified in this case by creation of a "new tort" based on the fact that the Star's voluntary correction notice was not large enough or high enough on page A-2 of its Sunday paper (Appellant's Brief p. 15).

ARGUMENT

I. THE DISTRICT COURT'S GRANTING OF SUMMARY JUDGMENT WAS BASED ON A CORRECT CONCLUSION THAT PLAINTIFF COULD NOT PROVE ACTUAL MALICE WITH CONVINCING CLARITY AND SHOULD BE AFFIRMED.

A. Plaintiff's Suggested Inference Regarding Editor Robbins' State of Mind Is Unsupported by the Record and Fails To Meet the Constitutional Standard of Proof Required in This Case.

Plaintiff readily recognizes[1] that his cause of action is governed by the Constitutional principles enunciated by the Supreme Court[2] and this Court[3] in the *New York Times* line of cases. Those cases establish that a public official,[4] or a public figure,[5] or even a private citizen involved in an event of general or public interest[6] may not recover damages for false and defamatory statements published about him unless the defendant published those statements with "actual malice," that is, with knowledge of their

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[1]Appellant's Brief 9.

[2]See, for example, *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *St. Amant v. Thompson*, 390 U.S. 727 (1968); and *Rosenbloom v. Metromedia, Inc.*, 39 U.S.L.W. 4694 (June 7, 1971).

[3]*Washington Post v. Keogh*, 125 U.S. App. D.C. 32, 365 F.2d 965 (1966), *cert. denied*, 385 U.S. 1011 (1967); *Thompson v. Evening Star*, 129 U.S. App. D.C. 299, 394 F.2d 774 (1968), *cert. denied* 393 U.S. 884 (1968); and *Wasserman v. Time, Inc.*, 138 U.S. App. D.C. 7, 424 F.2d 920 (1970), *cert. denied* 398 U.S. 940 (1970).

[4]*New York Times v. Sullivan*, note 2 *infra*, and *Washington Post v. Keogh*, note 3 *infra*.

[5]*Curtis Publishing Co. v. Butts*, note 2 *infra*, and *Thompson v. Evening Star*, note 3 *infra*.

[6]*Rosenbloom v. Metromedia, Inc.*, note 2 *infra*.

falsity or in reckless disregard of whether they were false or not.[7] Recklessness in this context means that "there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."[8]

Plaintiff does not dispute defendants' version of the factual events surrounding this publication—that the Star received the subject story (with error) over the wires of the Associated Press some time during the morning of September 13, 1968,[9] that Star editors normally rely on the accuracy of major wire service dispatches and attempt verification only when the story contains some apparent inconsistency or indication of error,[10] that Star personnel detected no such errors in the Waskow story when it was received by them from the AP,[11] that one Star editor went to the paper's clipping file on Dr. Waskow for purposes of obtaining background information on him (*not* for purposes of verifying the AP dispatch) and thus obtained four items of information about Dr. Waskow's personal history which were then added to the story,[12] that the story was then run

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[7]*New York Times v. Sullivan,* 376 U.S. 254 at 280 (1964).

[8]*St. Amant v. Thompson,* 390 U.S. 727 at 731 (1968).

[9]JA 48.

[10]JA 49.

[11]JA 49, 55.

[12]See Affidavit of Philip Robbins (JA 54-55): "On September 13, 1968, in my capacity as Principal Assistant City Editor, I received from Acting State Editor John Bartgis a proposed Star story concerning the September 12, 1968, appearance of Dr. Arthur I. Waskow before his Selective Service Board in Baltimore. I agreed with Mr. Bartgis' view that this story was a proper subject for inclusion in the Star's edition of that evening and concluded that the story would be made more interesting by the addition of some degree of background information on Dr. Waskow. Thus, I added to the story the reference to Dr. Waskow's service as an alternate delegate to the Democratic National Convention, his association with the Institute for Policy Studies and the National Convention for New Politics, and the

on page A-2 of the September 13, 1968 editions,[13] that another Star editor detected the error while reading through the paper later on September 13th and promptly notified his Star superiors and the AP,[14] and that the AP and the Star ran corrections with respect to this error *before* receiving any communications from plaintiff or his attorney.[15]

Assuming all this, plaintiff argues that the grant of summary judgment must nevertheless be reversed on the grounds that Star editor Philip Robbins' perusal of a clipping file for background information would provide a sufficient basis for a jury to infer that the Star published the Waskow story with full knowledge of its falsity. For reasons set out below, defendant submits that this argument is too tenuous and unreasonable to satisfy the exacting standard of proof which the Constitution places on plaintiffs in libel cases of this sort.

The *New York Times* rule is intended to protect vital First Amendment activity from the chilling effect of substantial litigation expenses just as much as from large judgments. Thus, in the case of *Washington Post Co. v. Keogh*, this Court declared that:

> "Summary judgment serves important functions which would be left undone if courts too restrictively viewed their power. Chief among these are avoidance of long and expensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement. . . .

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statement by Democratic Central Committee Chairman Bruce Terris protesting the draft board's decision to reclassify Dr. Waskow. My best recollection is that I obtained the information contained in the three above-described additions from the Star's clipping file on Dr. Waskow and from a statement received by me from Bruce Terris. After having made these editorial additions, I approved the story for placement in the edition of Friday, September 13, 1968."

[13] JA 69.

[14] JA 58.

[15] JA 43.

> "In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. One of the purposes of the *Times* principle, in addition to protecting persons from being cast in damages in libel suits filed by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes."[16]
> cates of unpopular causes."[16]

And, in a similar view, Mr. Justice Brennan has recently pointed out that "the very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to 'steer far wider of the unlawful zone' thereby keeping protected discussion from public cognizance."[17]

These opinions indicate that the *New York Times* "protection" is not addressed solely to insuring the appropriate outcome at the end of a trial. Indeed, perhaps its principal function is to terminate unwarranted litigation at an early stage so that a newspaper will not have to repeatedly undergo long and expensive litigation whenever it unknowingly publishes a defamatory statement.

Recognizing this function of the *New York Times* rule, Judge Wright's opinion in the *Wasserman* case announced a strict test for determining whether a plaintiff should be able to prolong litigation beyond the summary judgment stage in cases of this kind:

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[16] 125 U.S. App. D.C. 32 at 35, 365 F.2d 965 at 968 (1967), *cert. denied* 385 U.S. 1011 (1967).

[17] Brennan, J. in *Rosenbloom v. Metromedia, Inc.*, 39 U.S.L.W. 4694 at 4702 (June 7, 1971).

> "In my judgment *New York Times Co. v. Sullivan* makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the *Times* test of actual knowledge or reckless disregard of the truth . . . *Unless the court finds, on the basis of pretrail affidavits, depositions, or other documentary evidence, that the plaintiff can prove actual malice in the Times sense, it should grant summary judgment for the defendant.*"[18]

Proof of actual malice "in the Times sense" requires more than a mere preponderance of the evidence.[19] It must carry "the convincing clarity which the Constitutional standard demands."[20] Plaintiff's suggested inference about Star editor Philip Robbins' possible state of mind after looking over a clipping file falls far short of this demanding standard of proof.

Plainly the facts in this case do not even permit the inference which plaintiff urges on this Court. Looking through the newspaper clippings contained in Joint Appendix pages 118-161 gives some idea of the numerous anti-war activities in which Dr. Waskow's participation has been reported in the press.[21] Such widely reported anti-war and

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[18] *Wasserman v. Time, Inc.*, 138 U.S. App. D.C. 7 at 9, 424 F.2d 920 at 922 (1970), *cert. denied*, 398 U.S. 940 (1970). [Emphasis added.]

[19] Brennan, J. in *Rosenbloom v. Metromedia, Inc.*, 39 U.S.L.W. 4696 at 4701 (June 7, 1971).

[20] *New York Times v. Sullivan*, 376 U.S. 254 at 285 (1964). Cf. Brennan, J. in *Rosenbloom v. Metromedia, Inc.*, 39 U.S.L.W. 4604 at 4703; "Our independent analysis of the record leads us to agree with the Court of Appeals that none of the proofs, considered either singly or cumulatively, satisfies the constitutional standard with *the convincing clarity necessary to raise a jury question* whether the defamatory falsehoods were broadcast with knowledge that they were false or not" [emphasis added].

[21] See, for example, articles concerning Waskow entitled "Professor Fears Guns for War to Win over Butter," "Reform of Both Parties Sought by Peace Group," "Marchers Protest War Taxes," "5 Antiwar

general protest activity would be perfectly consistent with having been a co-defendant in the Spock case. One looking through such clippings, *not* for verification, but primarily for background information on Dr. Waskow to add to a story, *not* about the Spock trial but about Waskow's recent confrontation with his draft board, would hardly be prompted to the sudden recognition of an error that had previously escaped his notice, namely, that the anti-war conviction mentioned in one sentence of the fourth paragraph of the story was erroneous.

Plaintiff insists that, in reading through the clipping file, Robbins must have become aware of the *absence* of articles listing Dr. Waskow as a defendant in the Spock case and must thus have realized that the statement in the fourth paragraph of the subject story to the effect that Waskow was such a defendant was wrong. But Robbins has sworn under oath that he did *not* perceive the error in the story at the time of publication.[22] And plaintiff has offered no facts to show that Robbins must be lying.[23] Indeed, in his

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Nominees Suggested," "Coalition Backs, Clerics Oppose BUF," and "Waskow is Speaker on 'Great Decision'" at JA 120, 130, 131, 132, 138, and 150, respectively.

[22]"At no time prior to the publication of this story by the Star was I aware that the story was in any way erroneous, nor did I have any doubts as to its accuracy. I did not undertake to verify any of the factual statements contained in the story because it had been received from a reliable news service and did not exhibit to me any indication of possible error." Affidavit of Philip Robbins (JA 55).

[23]Cf. 6 Moore's *Federal Practice* (1966) at p. 2371-2: "It is also clear that the opposing party is not entitled to have the [summary judgment] motion denied on the mere hope that at trial he will be able to discredit movant's evidence; he must, at the hearing, be able to point out to the court something indicating the existence of a triable issue of material fact." In support of this proposition, Moore cites, among other cases, *Orvis v. Brickman*, 95 F. Supp. 605 (D. D.C. 1951) which held that summary judgment could not be staved off by plaintiff's mere hope of impeaching defendant's affidavits at trial.

Opposition papers in the District Court and again in his brief in this Court, plaintiff seems to assume that Mr. Robbins is telling the whole truth about this matter since he characterizes Robbins' affidavit as "commendably candid."[24]

Furthermore, plaintiff fails completely to suggest any reason why Robbins would go ahead and publish the Waskow story if he did in fact know that it contained an erroneous statement of a non-existent felony conviction. Philip Robbins is a newspaperman of twenty-three years experience and was, on September 13, 1968, Principal Assistant City Editor of the Star.[25] Surely such an editor would have realized that such a bald-face error could not be left in a story like this. Surely he would have striken the one offending sentence which was entirely collateral to the main point of the story, unless he really was interested in harming Dr. Waskow. But Mr. Robbins' "commendably candid" affidavit declares that:

> "None of my actions with respect to the publication of this story by the Washington Evening Star was in any sense motivated by ill will, malice, or hostility toward Dr. Waskow or anyone else. Although I had seen Dr. Waskow at one or two public events in and around Washington, I had never met him and certainly bore no personal animosity towards him."[26]

Plaintiff has not pointed to one scintilla of evidence to suggest that Mr. Robbins was hostile toward Dr. Waskow or

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[24]Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment, p. 8; Appellant's Brief p. 12.

[25]JA 54. At the time his affidavit was executed, Robbins had left the employ of the Star to become an Associate Professor of Journalism at George Washington University (JA 54).

[26]JA 55-56. Cf. *Associated Press v. Walker*, 388 U.S. 130 at 141 (1967): "[N]or was there any evidence of personal prejudice or incompetency on the part of Savell [author of the Walker dispatch] or the Associated Press."

had any reason whatsoever to knowingly defame him. The inference that Robbins must have known of the error but went ahead with publication anyway is *totally* unsupported by this record.

Thus, the District Court's rejection of this "file-search" inference was appropriate.[27] Plaintiff challenges Judge Bryant's conclusion that Robbins' review of the clipping file was a brief one. But the validity of this conclusion is apparent when one recalls that Randolph Arndt's discovery and rewriting of the *Baltimore Sun* story, the review of that rewritten story by Daniel Donahue, the issuance of the story on the AP wire, the discovery of that story by John Bartgis, Robbins' file review and editing of the story, and the placement of the story in line for publication all had to occur between the time of publication of the *Baltimore Sun* on the morning of September 13, 1968, and the printing deadline for the Star's first edition of the same day.

Plaintiff also criticizes the trial court for accepting Mr. Robbins' statement that his purpose in looking at the file was localization, not verification of the story. Plaintiff claims that only one of the references added was local in nature.[28] Of course, Robbins' stated purpose for the file search was the addition to the story of "some degree of background information on Dr. Waskow,"[29] telling local readers a little more about a local figure than the AP found appropriate in a national dispatch, whether such additions

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[27]In *New York Times v. Sullivan*, 376 U.S. 254 at 287, the Supreme Court held that a publisher's *failure* to go to the files could not support a libel judgment in cases entitled to Constitutional protection. In light of that decision it would surely have been anomalous for the District Court to hold that any time an editor *does* go to the files, he thereby raises a jury issue on the theory that the file search "must" necessarily have made the editor perceive the error in the story.

[28]Appellant's Brief 13.

[29]JA 55.

involved things Dr. Waskow had done here in Washington or nationally. As it happens, however, three[30] of the four items[31] added to the story *do* have a decidedly local connection.

In upholding the grant of summary judgment in another libel case involving the threat of First Amendment damage, this Court declared:

> "Since the very pendency of a libel action may cut across the public interest in free and untrammeled speech on public issues, a public figure cannot resist a newspaper's motion for summary judgment under Rule 56 by arguing that there is an issue for the jury as to malice unless he makes some showing, of the kind contemplated by the Rules, of facts from which malice may be inferred. This our appellant plainly did not do."[32]

Appellant in the instant case has similarly failed to fulfill his burden in overcoming a grant of summary judgment. In terms of the two kinds of "actual malice" which the Supreme Court has recognized, plaintiff is not really arguing publication in reckless disregard for truth. Rather, plaintiff is asserting that the Star, through its Principal Assistant City Editor Philip Robbins, published this story about Dr. Waskow *knowing* that it contained a false and defamatory statement.[33]

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[30] *I.e.*, (1) "served as an alternate *District of Columbia* delegate to last month's Democratic National Convention"; (2) "Waskow, who has been with the Institute for Policy Studies *in Washington*"; and (3) "the draft board decision to reclassify Waskow was strongly protested *in Washington* by Bruce Terris, Democratic Committee chairman there" [emphasis added] (JA 69).

[31] "was an organizer of the National Convention for New Politics last year in Chicago" (JA 69).

[32] *Thompson v. Evening Star*, 129 U.S. App. D.C. 299 at 301, 394 F.2d 774 at 776 (1968), *cert. denied*, 393 U.S. 884 (1968).

[33] Appellant's Brief p. 12.

This Court has held that sworn pretrial testimony of the publishing personnel will dispose of the issue of publication with actual knowledge of falsity in the absence of contrary affidavit or deposition evidence from the plaintiff.[34] Here, though he had nearly nineteen months for discovery between publication of the story and defendants' motion for summary judgment, plaintiff has not produced any affidavits, nor taken any depositions to controvert defendants' account of the publishing of this story. Indeed, at the final session of his deposition just over one year after this suit was filed, plaintiff admitted that he did not know which individuals at the Star effected publication of this story or what knowledge they had of him at the time they published the article.[35]

In short, plaintiff is simply attempting to escape the strictures of summary judgment and protract this expensive and unwarranted litigation by urging one unsupported inference which he cannot possibly prove with "the convincing clarity which the Constitutional standard demands."[36] This the First Amendment prohibits.

On page 13 of his brief, appellant declares that "a trial is clearly required in this case under the recent decision of the Supreme Court in *Ocala Star-Banner v. Damron*,"[37] but his discussion of that decision is factually wrong and misleading. In that case the defendant newspaper sought to show that, in publishing a story about a pending perjury

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[34] *Washington Post Co. v. Keogh*, 125 U.S. App. D.C. 32 at 36, 365 F.2d 965 at 969 (1966), *cert. denied*, 385 U.S. 1011 (1967).

[35] Plaintiff's Deposition at p. 288. The Supreme Court has made clear that knowledge of falsity cannot be imputed to a newspaper as an entity simply because its files reveal the error of a story; "publishing with knowledge of falsity" means that the persons who put the story in the paper knew it to be false. *New York Times v. Sullivan*, 376 U.S. 254 at 287 (1964).

[36] *New York Times v. Sullivan*, 376 U.S. 254 at 285 (1964).

[37] 39 U.S.L.W. 4268 (February 24, 1971).

case, it had inadvertently changed the name of the defendant from James Damron to that of his brother, Crystal City Mayor and county tax assessor candidate Leonard Damron. The plaintiff presented evidence tending to cast doubt on this explanation. At the close of the evidence, the trial court directed a verdict *for the plaintiff* on the issue of liability and submitted the case to the jury as to damages alone, rejecting the newspaper's argument that Damron was required to prove "actual malice" pursuant to the *New York Times* opinion.

Holding that the *Times* rule was indeed applicable to his case, the Supreme Court reversed the judgment for plaintiff since he had been allowed to recover "without a finding that the newspaper either knew the article was false or published it in reckless disregard of its truth of falsity."[38] The case was then remanded, *not* as appellant says,[39] for a new jury trial, but for "further proceedings consistent with this opinion" which might, of course, include either summary judgment or a directed verdict for the paper. The two dissenting justices were *not*, as plaintiff implies,[40] in favor of affirming the judgment below. The Court was unanimous in holding that the judgment for plaintiff must be reversed. But Justices Black and Douglas, in dissent, would have gone farther than the majority's mere remand and would have *dismissed the complaint* on the ground that "the First Amendment was intended to leave the press free from the harassment of libel judgments."[41]

In Section I-B of his brief, plaintiff attempts a secondary approach to proof of "actual malice" by suggesting that sale of back copies of the subject Star editions after discovery of the error (discussed in Argument I-B of this

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[38] *Id.* at 4269.

[39] Appellant's Brief p. 14.

[40] *Id.* 13.

[41] 39 U.S.L.W. at 4275.

brief) and alleged inadequacies in the Star's correction (discussed in Argument II of this brief) are not only independent grounds for liability but also show that the Star really did act with malice when it first published the story. There are very serious doubts that proof of subsequent conduct can ever establish the Constitutional requirement of "actual malice" at the time of publication.[42] However, plaintiff's reference to such post-publication conduct is apparently offered for the purpose of proving malice in the pre-*New York Times* sense of "malevolence" or "improper purpose"[43] and is thus irrelevant to the Constitutional standard of proof required of him in this case.[44]

B. Sale of Back Copies of a Newspaper Does Not Constitute a New Publication in the New York Times Sense.

Perhaps sensing the weakness of his main argument about editor Robbins' knowledge of the error in this story, plaintiff offers this Court an even weaker alternative argument for upsetting the District Court's grant of summary judgment. At page 22 of his brief plaintiff asserts that, even if publication of the Waskow story in the Star's September 13, 1968 editions was privileged because of "lack of knowledge of the truth," Dr. Waskow is still entitled to a verdict

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[42]The Supreme Court language which leaves open the question whether absence of a retraction can ever constitute proof of "actual malice" strongly suggests that no positive answer is likely to be forthcoming on that issue: "whether or not a failure to retract may ever constitute such evidence [*i.e.*, "adequate evidence of malice for constitutional purposes"], there are two reasons why it does not here." *New York Times v. Sullivan*, 376 U.S. 254 at 286 (1964).

[43]Appellant's Brief pp. 18-19, especially footnote 4 citing only pre-*New York Times* cases.

[44]That the constitutional definition of malice is very different from the common law use of the term was recently re-emphasized in Justice Brennan's opinion in *Rosenbloom v. Metromedia, Inc.*, 39 U.S.L.W. 4694 at 4697 (June 7, 1971).

since some back copies of those editions may have been sold after the Star discovered the error in the story and thus the paper *did* "publish" false and defamatory statements about plaintiff with full knowledge of their falsity. This argument is refuted by the record in this case and by the law in this jurisdiction on such sales.

First, it should be noted that the only evidence in this record of any such post-publication sales consists of one over-the-counter sale and one through-the-mail sale, both to the secretary of plaintiff's counsel in order to obtain copies of the issue for purposes of this law suit.[45] Such "publication" solicited by an agent of the person defamed is legally insufficient to support a finding of liability.[46] This is especially so where, as here, the Supreme Court has required that "actual malice" be established by proof carrying "the convincing clarity which the Constitutional standard demands."[47]

Secondly, it is clear that, even if plaintiff could prove that the Star sold some copies of its editions of September 13, 1968 after learning that the Waskow story was partly in error, such evidence would not establish that the Star

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[45]Plaintiff's Deposition pp. 290-292. As pointed out in the court below (Defendant Star's Reply to Plaintiff's Opposition to Defendants' Motion for Summary Judgment, p. 9), the Star cannot prove or disprove whether any back copies of the September 13, 1968 editions were ever actually purchased since Star records show only the revenue received from back copy sales and do not identify the specific editions sold.

[46]*Bufalino v. Maxon Brothers, Inc.*, 117 N.W.2d 150 (Mich. 1962); *Mick v. American Dental Association*, 139 A.2d 570 (N.J. App. 1958); *Patrick v. Thomas*, 376 P.2d 250 (Okla. 1962); *Renfro Drug Co. v. Lawson*, 160 S.W.2d 246, 146 A.L.R. 732 (Tex. App. 1942); *Annotation*, "Communication to Agent or Representative of Person Defamed as Publication or as Privileged," 172 A.L.R. 208 (and cases cited therein). Cf. *Washington Annapolis Hotel Co. v. Riddle*, 83 U.S. App. D.C. 288, 171 F.2d 732 (1948).

[47]*New York Times v. Sullivan*, 376 U.S. 254 at 285-6 (1964).

"published" the defamatory article with knowledge of its falsity. Obviously that requirement is designed to preclude the imposition of liability unless the newspaper actually ran its story in full awareness of the errors therein or with serious doubts as to its truth.[48] That is the sort of "publishing with knowledge of falsity" which the *New York Times* rule requires. To suggest in a case like this one that the Star is completely protected from liability for initially distributing thousands of copies of the Waskow story but that this protection should be instantly nullified if anyone purchases a single back copy after the paper discovered its error is to make a ludicrous nullity of that broad principle which the Supreme Court fashioned in aid of vigorous journalism and uninhibited dissemination of news to the public.

Moreover, plaintiff's argument clearly flies in the face of the concept of "publishing" which now prevails in this and most American jurisdictions. As Judge Holtzoff noted in *Ogden v. Association of the United States Army:*

> "From the foregoing discussion the conclusion is inescapable that the modern American law of libel has adopted the so-called 'single publication' rule; and, therefore, this principle must be deemed a part of the common law of the District of Columbia. In other words, it is the prevailing American doctrine that the publication of a book, periodical, or newspaper containing defamatory matter gives rise to but one cause of action for libel, which accrues at the time of the original publication, and that the statute

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[48] "Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity .... For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. . . . Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." *Garrison v. Louisiana,* 379 U.S. 64 at 75 (1964).

> of limitations runs from that date. It is no longer the law that every sale or delivery of a copy of the publication creates a new cause of action."[49]

This view of publication is entirely consistent with modern newspaper distribution techniques. In light of the realities of present mass media communication, it must be readily admitted that nearly all of the damage inflicted by a defamatory newspaper article is set in motion within hours of the time that the offending edition hits the streets. While newspapers, upon discovery of errors, often seek to publish a prompt correction, it does very little good to try to cut off further distribution of the original edition. The number of additional readers who may become aware of the defamation through the sale of back copies is usually quite small.[50] Obviously the general public does not buy back copies in order to become aware of current news. Rather, members of the public use the service primarily to obtain *additional* copies of issues already read and thus to secure for their files or friends extra copies of articles of particular interest, such as reports of weddings, award ceremonies, debuts, and the like.

True, a publisher may incur new and additional liability when he makes subsequent publication of the libel as "a conscious independent act," for example, reprinting the original newspaper and knowingly distributing it as a second edition.[51] However, where the publisher simply honors

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[49] 177 F. Supp. 498 at 502 (D. D.C. 1959).

[50] "A newspaper or periodical becomes stale soon after its publication, and only minimal damage is likely to be done by the circulation or recirculation of numbers that are out of date." *Gregoire v. G. P. Putnam's Sons*, 74 N.Y.S.2d 238 at 240 (App. Div. 1947). On appeal, in opposing the majority's extension of the single publication rule from the field of newspapers to books, Judge Desmond noted: "Since nothing is so dead as last week's newspapers, it is not unreasonable to hold that nothing that afterwards is done with them can be deemed a 'publication' in law." 298 N.Y. 119, 81 N.E.2d 45 at 50 (1948).

[51] *Winrod v. Time, Inc.*, 78 N.E.2d 708 (Ill. App. 1948); Seelman, *Law of Libel and Slander of New York*, chap. VI, par. 130 (1933).

requests to purchase old copies of the edition,[52] or maintains a copy of the edition in a public reading room,[53] courts have failed to find any liability beyond that arising from the original publication. And, in an opinion citing a wealth of authorities, Judge Kalodner has held that, in the case of mass newspaper and magazine distribution, subsequent mailing of miscellaneous copies does not constitute a publication independent of the original one.[54]

Plaintiff criticizes these citations of single publication cases as irrelevant, urging that the rule is simply designed to insure that "publication of a particular issue of a newspaper 'gives rise to but one cause of action'" and that "one cause of action is all that Dr. Waskow is here asserting."[55] But the single publication authorities are relevant to this case for they deal with the same issue of determining when, in light of modern publishing practices, a defendant's liability for publication should attach. When the law of libel was born several centuries ago, the absence of mass communication made it relatively easy to fix the moment at which "publication" occurred. Now, the "publication" of a given statement may extend over a considerable interval of time as thousands of copies of a book come rolling off the printing press or a given edition of a newspaper winds its way through its pre-determined and largely self-

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[52]*Means v. MacFadden Publications, Inc.*, 25 F. Supp. 993 (S.D. N.Y. 1939).

[53]*Wolfson v. Syracuse Newspapers, Inc.*, 4 N.Y.S.2d 640 (App. Div. 1938), *aff'd without opinion* 18 N.E.2d 676 (1939), *rehearing denied* 20 N.E.2d 21 (1939).

[54]*Hartmann v. Time, Inc.*, 64 F. Supp. 671 (E.D. Penn. 1946), *modified in part* 166 F.2d 127 (3rd Cir. 1948), *cert. denied* 334 U.S. 838 (1948).

[55]Appellants' Brief p. 21. Parenthetically, we note that, according to our count, Dr. Waskow is asserting *three* causes of action based on the defamatory sentence—one for the original publication of the story, one for sale of back copies of the same edition containing the story, and one for alleged inadequacy in correction of that story.

executing distribution channels. The whole point of Judge Holtzoff's observation in the *Ogden* case quoted above was that these modern realities of distribution require that each issue or edition of a printed work give rise to one cause of action "*which accrues at the time of the original publication.*" That is the time in the publication chain from which to date the statute of limitations and at which, we submit, the *New York Times* principle requires a showing of "actual malice."

Plaintiff argues that adopting this view would mean that a defendant whose original publication was without actual malice and thus privileged is "forever thereafter privileged to libel the plaintiff with the same defamation—even with malice."[56] But, as indicated above, the cases make clear that a once privileged defendant is not immune from liability if he subsequently undertakes to reiterate the libel anew, as, for example, if the Star had decided to run the same story again in its September 14, 1968, editions.

From the above discussion, it is clear that a plaintiff cannot avoid the whole purpose of *New York Times v. Sullivan* by having his attorney's secretary buy two copies of the offending newspaper edition after thousands of copies of that edition have been printed and are "on the streets." To accept such a rule would be to impose liability for not closing the barn door after the horse was gone. Clearly the *New York Times* rule was not intended to have any such foolish application.

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[56] Appellant's Brief p. 22.

II. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO PLAINTIFF'S "NEW TORT" PROPOSAL FOR IMPOSING LIABILITY ON THE STAR ON THE BASIS OF ALLEGED INADEQUACIES IN THE STAR'S SELF-INITIATED CORRECTION.

A. The Facts of This Case Do Not Support Plaintiff's Proposed Tort.

In Argument II of his brief plaintiff urges that, even if the Star and the AP could not be held liable for any aspect of the publication of this story, the District Court should nonetheless have required a jury trial on the theory that plaintiff might still recover from these defendants for a new "proposed tort."[57] Thus, plaintiff argues, a publisher should be subject to a public figure's suit for damages if, after discovering that he has libeled the plaintiff, he "willfully refuse[s] to make a good faith effort to take steps reasonably calculated to remedy the defamation."[58] As Judge Bryant's rejection[59] of this theory indicates, the facts of this case simply do not support plaintiff's new tort proposal.

As the record below clearly reveals, the Star promptly took appropriate, good faith action to remedy the error in the Waskow story as soon as it was discovered. That discovery, incidentally, was not a result of any communication from the plaintiff.[60] Rather, it came about shortly after publication of the September 13, 1968 editions when Star assistant city editor Boris Weintraub detected the error while reading through the paper.[61] Weintraub immediately

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[57]Appellant's Brief p. 29.

[58]Appellant's Brief p. 27.

[59]JA 89-90.

[60]Plaintiff's brief implies that the new tort only comes into effect when "the plaintiff has submitted to the defendant clear and convincing proof that the statement is false." Appellant's Brief p. 26.

[61]JA 58.

brought the error to the attention of his superiors at the Star and also notified the AP's Baltimore Bureau.[62]

On Saturday, September 14, 1968, the paper's Assistant Managing Editor Charles Seib directed that a Star correction be prepared with respect to the Waskow story.[63] Upon receipt of that correction, Seib reviewed its contents and discussed the matter with one of the Star's attorneys.[64] Seib decided to run the correction in the editions of Sunday, September 15, 1968, because

> "our [the Star's] Saturday circulation is considerably smaller than our weekday circulation whereas our Sunday circulation is considerably larger and I [Seib] wanted to reach the broadest possible audience of Star readers."[65]

The correction notice was published in the Sunday Star for September 15, 1968. It was not buried somewhere in the back of the paper but was run on page A-2,[66] the same page on which the original story appeared.[67] The correction was full and candid[68] and completely exonerated Dr. Waskow from the erroneous identification with those con-

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[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] JA 70.

[67] JA 69.

[68] CORRECTION—"An Associated Press story in Friday's Star erroneously reported that Arthur I. Waskow, who is fighting induction by a Baltimore draft board, was among those convicted in Boston for conspiring to aid and counsel draft law violations.

"Waskow was not a defendant in Boston. The AP dispatch had incorrectly listed him along with the defendants, Dr. Benjamin Spock, Yale Chaplain William Sloane Coffin and writer Mitchell Goodman. The main point of Friday's news story was that Waskow asked members of Local Board 20 to resign "rather than continue to conscript men for an unconstitutional, illegal, immoral and obscene war in Vietnam" (JA 70).

victed of counseling draft resistance in the Spock case.[69] While the total length of the correction was indeed shorter than the total length of the original article, it was, of course, only one paragraph of that article which was in error and needed correcting. Thus, as Judge Bryant noted, the correction "was considerably larger than the space occupied by the libelous statement within the article."[70]

All of the above corrective actions were voluntarily undertaken by the Star, at its own initiative, *before* anyone at the paper received any communication from the plaintiff respecting this story.[71] On the facts of this case, the District Court was surely correct in holding that the Star's retraction efforts were "certainly adequate under the circumstances"[72] and in thus rejecting plaintiff's claim for imposing liability under a proposed new tort of failure to make adequate correction of a privileged defamation.

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[69]This identification was hardly a heinous imputation of venality since even the government readily conceded that the *Spock* defendants had acted sincerely and out of moral principle in opposing what they honestly believed to be an illegal war. Mitford, *The Trial of Dr. Spock* 191 (1969). Furthermore, in light of his substantial public involvement in the events which led to their trial (JA 31-34), his public speeches and support in their behalf (JA 34-35), and his trip to Boston designed to express his belief that they had not in fact violated the law (Plaintiff's Deposition p. 115), one may wonder just how critical it was to Dr. Waskow to have the Star publically disassociate him from the *Spock* defendants. (Testimonial references to Waskow, sometimes confusing him with defendant Raskin, came up throughout the Spock trial, see Mitford, *Op. Cit.* at pp. 34, 42, 44, 49, 111, 126, 155, 160, 186, 226.)

[70]JA 90.

[71]JA 43.

[72]JA 90.

B. Plaintiff's Proposed Tort Is Unsound as a Matter of Law.

Plaintiff's argument for establishment of the new tort he urges seems to be based primarily on the undoubted proposition that the field of tort law is constantly evolving[73] and on a notion advanced in recent academic writings of Jerome Barron.[74] Prof. Barron's thesis is that the primary threat to the First Amendment is not governmental interference but rather the danger that the mass media will not provide an adequate opportunity for the expression of unorthodox and unpopular views.[75] To remedy this evil, Barron proposes recognition of an absolute right of access to the media in certain situations.[76]

It should be readily pointed out that Prof. Barron's proposal is not germane to the instant case for a variety of reasons, for example, (1) when talking about newspapers, his principal focus is the monopoly newspaper town,[77] not one which has three competing dailies; (2) his main concern in advocating a right of access is to guarantee publication of unorthodox, unpopular ideas,[78] not redressing harm to reputation;[79] and (3) his primary call is for legislative

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[73]Appellant's Brief p. 32.

[74]Appellant's Brief p. 29.

[75]Barron, *Access to the Press–A New First Amendment Right*, 80 Harv. L. R. 1641, 1656 (1967).

[76]*Id.* at 1666.

[77]*Id.* at 1666, 1669, 1678.

[78]*Id.* at 1649.

[79]"[T]he daily press cannot be placed at the mercy of the collective vanity of the public." *Id.* at 1677. "What is essential is not that everyone shall speak, but that everything worth saying shall be said." *Id.* at 1653 quoting A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* 25-28 (1960).

relief[80] although he believes that judicial intervention is possible "at least in the most arbitrary cases."[81]

However, the fundamental point about Prof. Barron's analysis in the context of this case is that, when he does talk about libel to public figures, he is not talking about adequacy of corrections at all. Rather, he urges that a libeled public figure should have a guaranteed "right of access,"[82] an opportunity to present *his* answer to the erroneous account either in the letter to the editors column or in a paid advertisement.[83] Nowhere in his three articles does Prof. Barron urge judges to get themselves into the business of appraising the adequacy of a newspaper's corrective actions and sending cases of public figure libel to the jury when they feel the correction really ought to have been a bit larger, or perhaps a little higher on the page.

The present case does not present a right of access problem. There was no evidence before the District Court of any denial of access whatsoever. So far as the record shows, plaintiff never submitted to the Star any letter to the editor or advertisement with respect to the subject defamation, nor was he in any other way denied an opportunity to respond to the Star story or tell his side of the matter.[84]

Furthermore, it is quite difficult to discern any denial of access problems afflicting Dr. Waskow, a marvelously-vocal public figure whose writings have been published by *The Wall Street Journal, The New Republic, Saturday Review,*

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[80] *Id.* at 1670.

[81] *Id.* at 1678.

[82] *Id.* at 1667.

[83] *Id.*

[84] The record does reveal at least five other occasions on which letters submitted by Dr. Waskow were published by local newspapers: *Baltimore Sun,* March 15, 1961 (JA 148); *Washington Post,* April 29, 1968 (JA 133); *Washington Post,* June 11, 1968 (JA 137); *Washington Star,* February 7, 1969 (JA 163); *Washington Post,* April 1, 1969 (JA 162).

Ramparts, Commentary, Yale Review, Cavalier, Rand-McNally, Doubleday, The Princeton University Press, the Columbia University Press, and others[85] and who made over 100 public, often press-covered speeches between February 1965 and February 1969.[86] Indeed, the very unorthodox idea for which Dr. Waskow was seeking publicity in this case, namely, that draft board members should resign rather than help send American soldiers into Viet Nam, received prompt and prominent publication in the Star and in other branches of "the mass media."

Dr. Waskow wasn't denied access to the media. He simply didn't believe the Star's correction was "prominent" enough. But as Mr. Justice Brennan has recently observed,

> "Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story."[87]

The thesis which plaintiff is here asserting in the form of a "new tort" is very different from any right of access proposal, and poses a much graver threat of First Amendment damage. Rather than guaranteeing a right of reply to public figures, plaintiff urges this Court to hold that a publisher protected from liability by *New York Times* should still have to pay for an innocently published libel if a judge or jury concludes that his correction actions were not really "appropriate" or "adequate."[88] While the Barron proposal would force newspapers to print whatever the *public figure* chose to offer in reply to a libel, plaintiff's proposal would result in courts telling editors what *the newspapers* should have prepared by way of corrections in particular libel sit-

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[85] JA 92-96.

[86] JA 31.

[87] Brennan, J. in *Rosenbloom v. Metromedia, Inc.,* 39 U.S.L.W. 4694 at 4700.

[88] Appellant's Brief pp. 7, 15, 27, 31, 34.

uations.[89] It is very difficult to see how this sort of governmental critiquing of newspaper content can be squared with the First Amendment.[90]

In *New York Times v. Sullivan,* the Supreme Court sought to give newspapers a "breathing space"[91] for dealing with controversial stories by precluding the imposition of judgments handed out by juries who might feel the paper hadn't used reasonable care in the investigation of the story.[92] Plaintiff's proposed "tort" would simply shift the constitutionally impermissible "reasonableness" test from prepublication to post-publication handling of the story, thus allowing jurors naturally outraged by damage done to erroneously defamed individuals to impose the same kind of crippling judgments[93] when they feel that a newspaper didn't

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[89]While plaintiff would no doubt protest that his proposal involves only an after-the-fact judicial appraisal of whether a particular correction was adequate and made in good faith, obviously a succession of such adjudications would result in judicial enunciation of how editors must draft and place their corrections in order to escape liability.

[90]As noted by New York Times editor Clifton Daniels: "It is impossible to guess what the makers of our Constitution would have said about television, but I have a pretty good idea of what they meant by freedom of the printed word, and they certainly did not mean that it should be controlled, regulated, restricted, or dictated by government officials, legislators, or judges. Indeed, the makers of the Constitution meant exactly the opposite—that officialdom, constituted authority, should keep its hands off the press, that it should not tell newspapers what to print and what not to print." Daniels, *Right of Access to Mass Media—Government Obligation To Enforce First Amendment,* 48 Tex. L. R. 783 at 787-8 (1970).

[91]*Rosenbloom v. Metromedia, Inc.,* 39 U.S.L.W. 4694 at 4701.

[92]"Reasonable care is an 'elusive standard' which 'would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.'" *Rosenbloom v. Metromedia, Inc.,* 39 U.S.L.W. 4694 at 4701 quoting *Time, Inc. v. Hill,* 385 U.S. at 389.

[93]Cf. Marshall, J. dissenting in *Rosenbloom v. Metromedia, Inc.,* 39 U.S.L.W. 4694 at 4711: "Our notions of liberty require a free and

really do all it should have to undo the harm (an exceptionally "elusive" and probably impossible task).

Furthermore, it is far from clear that such reallocation of judgment about how to compose and run correction notices would be a socially beneficial step. Taking a look at the page of the Sunday Star on which this particular correction was run[94] illustrates the complex and essentially nonjudicial nature of the inquiries which plaintiff's tort theory would require courts to take on. For example, (1) Should this correction have been run on a different place on the page? (2) Would it have been better to swap this correction with the mid-page story on the plane crash of a noted physicist? (3) What is the relative social importance and newsworthiness of these two stories? (4) Is the correction perhaps likely to attract more readers where it is—next to the "News Views" cartoon and the announcement of a coming public speech by former Senator Paul Douglas? (5) Do more people necessarily read stories in the middle of the page than along the bottom border? (6) Might the large block advertisement correction in the corner, and the adjacent solid black ad with its prominent figure "5" attract readers' eyes to the bottom portion of this page? (7) Should more space be devoted to this correction notice? (8) Can some space be taken away from the advertisement correction, or is the paper under a contractual and economic obligation to run a major correction notice when an ad purchased by one of its advertisers incorrectly lists prices of merchandise?[95] (9)

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vigorous press that presents what it believes to be information of interest or importance; not timorous, afraid of an error that leaves it open to liability for hundreds of thousands of dollars." The degree to which juries can be outraged by the occasional libels which inevitably attend robust journalism is evident in the verdicts returned in *Rosenbloom v. Metromedia, Inc.*, 39 U.S.L.W. 4694 ($750,000); *Associated Press v. Walker*, 388 U.S. 130 ($800,000); and *Curtis Publishing Co. v. Butts*, 388 U.S. 130 ($3,060,000).

[94]JA 70.

[95]Selling advertisements, of course, is one of the principal ways by which newspapers defray the costs of an extremely expensive

How big was the original ad in which the erroneous prices appeared? (10) Must a correction be run in every case or are there some situations in which the correction does more harm than good by reviving the libel and engendering a "where there's smoke, there's fire" attitude. Putting plaintiff's proposal to the test like this raises extremely grave doubt that courts are either well suited or authorized under the First Amendment to make these decisions about arrangement of newspaper pages and to impose legal liability for deviations therefrom.

Clearly these sorts of decisions involve difficult matters of judgment[96] and must inevitably be made, as they are made in every other aspect of the news business, by trained and experienced editors. Inevitably there will be some mistakes and some abuses in this process.[97] But our constitutional system is committed to the proposition that such mistakes are far less serious in the long run than the prospect of governmental supervision of press content.[98] To date no court has thought it wise to inject judge and

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enterprise. The severe economic pressures impinging on such an enterprise is demonstrated by the fact that rising costs of everything from newsprint to labor have reduced the number of daily newspapers from 2202 in 1910 to 1760 in 1954, J. R. Wiggins, *Freedom or Secrecy*, 178 (rev. ed. 1964).

[96]"One function of news is the professional judgment of what is more and what is less important at any given hour. There can be only one lead, one second lead, one third lead. Despite all the flaws in these decisions, someone has to do it, and judges and legislators are not able to do it better." Bagdikian, *Right of Access: A Modest Proposal*, 8 Col. Journ. R. 10 at 12 (1969).

[97]"Newspapers are human institutions and when human beings compose 250,000 words in a few hours they make mistakes." Bagdikian, *Op. Cit.* at 13.

[98]See Brennan, Jr. in *Rosenbloom v. Metromedia, Inc.*, 39 U.S.L.W. 4694 at 4702:

> "We are aware that the press has, on occasion, grossly abused the freedom it is given by the Constitution. . . . But from the earliest days of our history, this free society, depend-

jury into that exercise of professional judgment required in deciding what steps under particular journalistic circumstances are "reasonably calculated to remedy the defamation"[99] of a publication protected by *New York Times v. Sullivan.* This decision-making process is a fairly subtle one requiring sensitivity to such diverse factors as the nature of the error, the current news climate, the likelihood that the error may have gone substantially undetected, the possibility of increasing rather than reducing damages through a correction which revives the libel, the mechanics of page placement and readers' tracking patterns, and the like. Proper decision-making in the context of these complex factors requires considerable journalistic experience and judgment. The evaluation of whether a correction was really "adequate" is hardly a simple matter of comparing inches and type point.

Of course, trials could undoubtedly be had on these issues with experts testifying for and against particular placement or composition decisions. But no court has yet sanctioned such a practice. And obviously such trials would substantially undercut the *New York Times* objective of

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ent as it is for its survival upon a vigorous free press, has tolerated some abuse. In 1799, James Madison wrote:

> "'Among those principles deemed sacred in America, among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this *liberty* is often carried to excess; that it has sometimes degenerated into *licentiousness,* is seen and lamented, *but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America.*'" [Emphasis in original.]

[99]Appellant's Brief p. 27.

freeing publishers from fear of expensive and protracted litigation over public interest stories. Were this Court to recognize plaintiff's new tort, embittered public figures would be given a new battlefield on which to take on the newspapers they dislike. Now barred by *New York Times* from attacking the paper on grounds of pre-publication ill will or negligence, they would be encouraged by *Waskow* to thrust the papers into lawsuits challenging the adequateness or good faith of various post-publication correction measures. Newspapers would certainly be reluctant to engage in that truly vigorous and uninhibited reporting of public issues which inevitably occasions some error if they knew they could expect long and expensive litigation every time an aggrieved plaintiff felt unsatisfied with a paper's corrective measures.

In short, it is submitted that plaintiff's proposed tort is unsound as a matter of legal theory and is totally unsupported by the facts of this case which show a full and candid correction voluntarily published by the Star on the second page of its most widely circulated edition. As with plaintiff's failure to prove "actual malice" discussed herein in Argument I, the District Court's granting of summary judgment as to plaintiff's proposed "tort" is amply supported by the record and should be affirmed.

CONCLUSION

For the reasons set out above, it is submitted that the Court did not err in granting summary judgment in favor of the defendant Evening Star Newspaper Company and that the judgment below should be affirmed.

Respectfully submitted,

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BRIEF OF APPELLEE
ASSOCIATED PRESS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1109

ARTHUR I. WASKOW, *Appellant*,

v.

ASSOCIATED PRESS

and

THE EVENING STAR NEWSPAPER COMPANY, *Appellees*.

Appeal from the United States District Court
for the District of Columbia

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OTHER AUTHORITIES:

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ISSUES PRESENTED

1. Whether reckless disregard of the truth can be found in an erroneous report where it is uncontroverted that the error resulted from an Associated Press staff member's misreading of his source of information.

2. Where the AP was constitutionally protected against liability because of an inadvertent error in a story concerning a public figure and promptly issued an unsolicited correction of that error, should this protection be eroded by the creation of a new tort designed to litigate appellant's claim that the corrective action taken was inadequate.

* * * * *

This case has not previously been before this court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1109

ARTHUR I. WASKOW, *Appellant,*

v.

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and

THE EVENING STAR NEWSPAPER COMPANY, *Appellees.*

BRIEF OF APPELLEE ASSOCIATED PRESS

Appeal from the United States District Court for the District of Columbia

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STATEMENT OF THE CASE

The Nature of the Case

This is a civil action for libel based on a story disseminated by appellees Associated Press [hereinafter AP] and The Evening Star Newspaper Company [hereinafter the Star]. After discovery by both sides, appellees moved for summary judgment. After an oral hearing and full consideration, the trial court granted the motion. (JA 81-90).[1]

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1 "JA" indicates the reference to the Joint Appendix.

Statement of Facts

This libel action has been brought by Dr. Arthur I. Waskow, a prolific author and lecturer and an anti-war and social activist. Dr. Waskow seeks damages based on the AP's issuance and the Star's publication of a news article reporting on Dr. Waskow's confrontation-type appearance before his draft board in Baltimore, Maryland on September 12, 1968, which article erroneously identified Dr. Waskow as one of the defendants convicted in the "*Spock* case" (see p. 3, *infra*). (JA 62-63).

Dr. Waskow has resided and worked in Washington since 1959, first as a Congressional legislative assistant, then as a senior staff member of the Peace Research Institute, and since 1963 as a Trustee and Resident Fellow of the Institute for Policy Studies. (JA 28). He has lectured and spoken across the country in opposition to the Vietnam War and on other subjects (JA 28-31, 44), has published at least eight books and forty-nine articles on peace, disarmament and other subjects (JA 92-96), and has been a member, organizer, or director of some twenty-five political, civic and academic organizations, including Resist (an organization formed to raise money for legal aid for men who refused to be drafted) and the New Mobilization Committee to End the War in Vietnam. (JA 35-36, 112).

In connection with his various public activities, Dr. Waskow has frequently distributed press releases to the news media resulting in considerable press coverage. (JA 30-31, 34, 37-40, 43-44).

In 1967 and early 1968, Dr. Waskow's anti-war activities were particularly significant. In September, 1967, Dr. Waskow, along with Reverend William Sloane Coffin, Jr., Dr. Benjamin Spock, Mitchell Goodman, Marcus Raskin, and others, co-authored an anti-draft tract entitled "A

Call to Resist Illegitimate Authority" and presented it at a press conference in New York City. (JA 31-32). Further, on October 20, 1967, at the invitation of Reverend Coffin, Dr. Waskow joined several signers of the above-described Call, as well as several hundred other persons, in a mass anti-draft demonstration at the Department of Justice presided over by Reverend Coffin. (JA 32). In the course of this demonstration, Dr. Waskow joined Reverend Coffin, Dr. Spock, Raskin, Goodman, and about a dozen others in meeting with an Assistant Attorney General and presented to him a briefcase full of draft cards (including Dr. Waskow's) turned in by various registrants as an act of protest against the Vietnam War. (JA 32-33).

In January, 1968, Dr. Spock, Reverend Coffin, Raskin, Goodman, and Michael Ferber were indicted for conspiracy to obstruct the draft. *United States* v. *Coffin, et al.*, Criminal Action No. 68-1-7 (D. Mass. 1968) (hereinafter the "*Spock* case") (A certified copy of the indictment appears at JA 99-104). The actions described in the previous paragraph were cited as overt acts in the conspiracy in that case. (JA 103-4). Dr. Waskow was subsequently named by the Government as a co-conspirator, but not indicted. (JA 105-6, 143). Shortly after the indictment was announced, Dr. Waskow addressed another demonstration at the Justice Department urging that then Secretary of Defense McNamara, not Dr. Spock *et al.*, should be prosecuted. (JA 34).

After having turned in his draft card in October of 1967, Dr. Waskow was notified in the spring of 1968 that his selective service classification was being changed from IV-F to I-A. (JA 39). Dr. Waskow determined to appear before his draft board and urge the members to resign *en masse* rather than to conscript people into what he considered to be an illegal war, and, in advance of the meeting, he prepared and distributed a press release announcing

this plan. (JA 39). This press release identified Dr. Waskow as one of the authors of the aforementioned "A Call to Resist Illegitimate Authority" and as a participant with Spock, Coffin, and others in the aforementioned October 20, 1967 meeting with an Assistant Attorney General at which the briefcase of draft cards (including Waskow's) were surrendered. (JA 39).

Dr. Waskow's hearing before his draft board on September 12, 1968 was covered by the press. In fact, when Dr. Waskow arrived at the meeting, which was held at the U.S. Custom House in Baltimore, the press and members of the Baltimore anti-war movement were on hand, and Dr. Waskow insisted that they be admitted to the hearing itself. (JA 40). However, the Chairman of the draft board refused and after a confrontation between Dr. Waskow and the Chairman (JA 40, 139) all but Dr. Waskow were escorted outside by building guards. (JA 139). After the hearing, Dr. Waskow met with the press in front of the building, answering questions from reporters about the meeting and posing for photographs. (JA 40, 139).

As part of its regular operations, the Baltimore Bureau of the AP reviews stories run each day by AP member newspapers in the Baltimore area, selecting certain of these stories for condensation and distribution to other member papers. (JA 46). On the morning of September 13, 1968, this function was performed by Randolph C. Arndt of the Baltimore Bureau. Among the stories selected by Mr. Arndt was a *Baltimore Sun* article of that morning describing Dr. Waskow's draft board meeting of the previous day. (JA 61). The *Sun* article, in referring to Dr. Waskow, states in part:

> "He was among the teachers and writers who met with Justice Department officials that day. The group included Dr. Benjamin Spock, the pediatrician; the Rev. William Sloane Coffin, chaplain of Yale University, and Mitchell Goodman, the writer.

"4-F Deferment Lifted"

> "All three were sentenced to two-year jail terms and received $5,000 fines last July 11 on charges of conspiring to aid and counsel violations of the draft law. They are free on bail pending appeal." (JA 41).

In reading the above quoted passage, Mr. Arndt mistakenly concluded that Dr. Waskow was among the defendants in the "*Spock* case," *supra,* and the story as he rewrote it reflected this belief. (JA 41, 46-47). Mr. Arndt's story was reviewed by AP State Editor Daniel Donahue, Jr., who saw nothing wrong with it and thus made no substantive alterations or corrections. (JA 41, 53). The story was then issued on the wire that morning so as to be available for use by that day's afternoon papers. (JA 41, 53). Neither Mr. Arndt nor Mr. Donahue had any previous knowledge of Dr. Waskow, nor were they aware of the identity of all of the defendants in the "*Spock* case", *supra.* (JA 42, 46, 53).

On the same date (September 13, 1968) the AP story was received at the offices of the Star and selected for insertion in that evening's editions. (JA 42). After certain additions were made, the article was published. (JA 42, 54-55). At the time of publication, no one at the Star was aware that the story contained an error. (JA 48-49, 55). After publication, the error in the story was detected and the Baltimore Bureau of the AP was notified. (JA 58).

Following this notification, on the morning of September 14, 1968, the Baltimore Bureau issued on its local wire a corrective story (JA 65), accompanied by a request to those newspapers which printed the original story to print the correction. (JA 42). It also brought the error to the attention of AP's General Desk in New York which (also on the morning of September 14) issued over the two other wires on which the original story had been car-

ried, and to all AP Bureaus, a corrective story (JA 66) accompanied by a request that the same be printed by any newspaper which had printed the original story. (JA 50, 52). These actions complied fully with AP's regular procedures with respect to correction of an error. (JA 52).

On September 15, 1968, the Star ran a correction in its Sunday edition in order to reach the largest possible number of Star readers. (JA 58, 67).

The foregoing corrective actions of AP and the Star were taken before either party had received from appellant a demand for retraction or any other communication respecting the story. (JA 43). After demanding that both appellees undertake further corrective steps regarding the original story (JA 71-80), appellant filed suit against AP and the Star on January 2, 1969. The appellees took the deposition of appellant on June 24 and 25, 1969, and January 8, 1970. The appellees then moved on April 8, 1970 for summary judgment in their favor, accompanying their motion with affidavits of the pertinent personnel involved in publication of the original story and the corrections. (JA 46-60). Appellant opposed this motion, but presented no conflicting affidavits or depositions. After hearing arguments on the merits and taking the matter under advisement, the District Court (Bryant, J.) granted summary judgment in favor of both appellees and issued a memorandum opinion.

In that opinion, Judge Bryant found that Dr. Waskow was undoubtedly a public figure as a result of "his purposeful activity" which amounted to "a thrusting of his personality into the 'vortex' of an important controversy." The Court determined that as a result the rule of *New York Times* v. *Sullivan* (376 U.S. 254 (1964)) applied, and that the issue became whether the apppellees had published the article with "actual malice" as defined in the *New York Times* case, namely with knowledge of its falsity or

in reckless disregard of the truth. 376 U.S. at 279-80. Judge Bryant granted summary judgment to both appellees. (JA 90). Judge Bryant found that the evidence was "overwhelming" that the error in the AP story resulted from a "human mistake" and that AP "entertained no serious doubts as to the truth of [the] publication" when it was dispatched. (JA 87-88).

The District Court also rejected appellant's argument for the creation of a "new tort" of willful refusal to make a good faith effort to correct an erroneous story, finding "no persuasive reason" to take such action (JA 89) and concluding that, even if a correction were to be required, the corrections issued by AP and the Star were "certainly adequate under the circumstances." (JA 90).

On this appeal, appellant admits that his case is governed by the principles established in *New York Times* v. *Sullivan* and succeeding cases. All that he argues with respect to AP is that the trial court's grant of summary judgment was erroneous because (1) appellant is entitled to a jury trial as to whether or not the mistake made by AP was made in "reckless disregard of the truth" (App't. Br. 23);[2] and (2) the constitutional protection afforded AP by the *New York Times* rule should be disregarded in this case by the "creation" of a "new tort" based on AP's "willfully refusing to make a good faith effort to correct" the erroneous story. (App't. Br. 26). Indeed, the latter contention is made even though AP issued an unsolicited correction, a fact which appellant ignores in his argument. (App't. Br. 26-34).

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[2] "App't. Br." indicates the reference to the Brief of Appellant.

ARGUMENT

I

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE APPELLANT HAS PRODUCED NO EVIDENCE THAT WOULD SHOW THAT THE ERROR MADE BY AP WAS MADE WITH RECKLESS DISREGARD OF THE TRUTH.

A. Summary Judgment Is an Appropriate Remedy in a Libel Case Where Constitutional Issues Are Raised

It is well established that where, as here, the rule of *New York Times* v. *Sullivan*[3] applies, summary judgment is an appropriate remedy. *Wasserman* v. *Time, Inc.*, 138 U.S. App. D.C. 7, 424 F. 2d 920, *cert. denied* 398 U.S. 940 (1970); *Time, Inc.* v. *McLaney*, 406 F. 2d 565 (5th Cir.), *cert. denied* 395 U.S. 922 (1969); *Bon Air Hotel, Inc.* v. *Time, Inc.*, 295 F. Supp. 704 (S.D. Ga. 1969); *United Medical Laboratories, Inc.* v. *Columbia Broadcasting System, Inc.*, 404 F. 2d 706 (9th Cir. 1968), *cert. denied* 394 U.S. 921 (1969); *Thompson* v. *Evening Star Newspaper Co.*, 129 U.S. App. D.C. 299, 394 F. 2d 774, *cert. denied* 393 U.S. 884 (1968); *Washington Post Co.* v. *Keogh*, 125 U.S. App. D.C. 32, 365 F. 2d 965 (1966), *cert. denied* 385 U.S. 1011 (1967).

Thus in *Washington Post Co.* v. *Keogh, supra,* this court noted:

> "In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment [long and expensive litigation productive of nothing] succeeds, is free debate." 125 U.S. App. D.C. at 35, 365 F. 2d at 968.

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[3] As discussed at p. 10 *infra*, under *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), a plaintiff must prove that the defendant acted with "actual malice" which the Court defined as a publication made "with knowledge that it was false or with reckless disregard of whether it was false or not". 376 U.S. at 279-80.

Again, in *Thompson* v. *Evening Star Newspaper Co., supra,* this court commented:

> "Since the very pendency of a libel action may cut across the public interest in free and untrammeled speech on public issues, a public figure cannot resist a newspaper's motion for summary judgment under Rule 56 by arguing that there is an issue for the jury as to malice unless he makes some showing, of the kind contemplated by the Rules, of facts from which malice may be inferred." 129 U.S. App. D.C. at 301, 394 F. 2d at 776.

Most recently, in a concurring opinion in the case of *Wasserman* v. *Time, Inc., supra,* Judge Wright, with Judge Robinson, stated:

> "In my judgment New York Times Co. v. Sullivan makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the *Times* test of actual knowledge or reckless disregard of the truth. [citation omitted] Unless the court finds, on the basis of pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice in the *Times* sense, it should grant summary judgment for the defendant [citations omitted]." 138 U.S. App. D.C. at 9, 424 F. 2d at 922.

In sum, the law is clear that summary judgment is appropriate here, unless appellant can show on the basis of affidavits, depositions, or other documentary evidence that "actual malice" can be proved "in the *Times* sense." As discussed *infra,* it is abundantly clear that no such showing whatsoever has been made by appellant with respect to appellee AP. Accordingly, summary judgment is entirely proper in this case.

B. Appellant Has Produced No Evidence That Would Show That the Error Made by AP Was Made With Reckless Disregard of the Truth

In the landmark case of *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), the Supreme Court held that in a libel suit brought by a "public official" concerning his official conduct the plaintiff must prove that the libelous statement was made with "actual malice", which the Court defined as "with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80. The *New York Times* rule has since been extended by the Supreme Court to cover suits by "public figures", *Curtis Publishing Company* v. *Butts,* 388 U.S. 130 (1967), and suits by private individuals which relate to stories or events "of public or general interest." *Rosenbloom* v. *Metromedia,* — U.S. —, 29 L ed 2d 296 (1971). Further, the Supreme Court has stated that "reckless disregard" of the truth exists only when the defendant "in fact entertained serious doubts as to the truth of his publication." *St. Amant* v. *Thompson,* 390 U.S. 727, 731 (1968).

In this case appellant conceded below that he is a "public figure" (JA 85), and it also seems clear that the story in issue relates to a matter of "public or general interest." Further, appellant in his brief apparently concedes that the *New York Times* rule is applicable to this case and that AP did not act with knowledge of falsity. (App't. Br. 23-26). He contends, however, that a jury trial should be held on the question of whether AP acted with "reckless disregard of the truth" in issuing its story. (App't. Br. 23).

As indicated, the Supreme Court in *St. Amant* v. *Thompson, supra,* precisely defined the term "reckless disregard of the truth". In that case, a political candidate erroneously charged a deputy sheriff with certain nefarious conduct. The candidate had no personal knowledge

of the deputy sheriff's activities, and relied wholly upon an unverified affidavit of a third party. 390 U.S. at 730. In reversing the finding of the Supreme Court of Louisiana that St. Amant recklessly disregarded whether the statements made were true or false, the Court stated:

> "These cases [*New York Times* v. *Sullivan, supra; Garrison* v. *Louisiana,* 379 U.S. 64 (1964); and *Curtis Publishing Co.* v. *Butts, supra*] are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." 390 U.S. at 371.

This definition of "reckless disregard" has recently been reaffirmed by the Court in *Rosenbloom* v. *Metromedia, supra,* 29 L ed 2d at 319.

Applying the *St. Amant* rule to this case, appellant must show that either Mr. Arndt, the AP staff member who drafted the story in issue, or Mr. Donahue, the AP editor who reviewed the story prior to its distribution, "in fact entertained serious doubts as to the truth of [the] publication." But the uncontroverted facts make clear that this was absolutely not the case (affidavits of Mr. Randolph C. Arndt and Mr. Daniel Donahue, Jr., JA 46-47, 53). Appellant has produced no evidence whatsoever to controvert these affidavits.

Rather, appellant sets forth four conclusionary and untenable arguments (App't Br. 23-26). First, appellant claims that AP's post-publication conduct is relevant in determining whether AP in fact entertained serious doubts. (App't Br. 23). Aside from the fact that AP's post-publication conduct was entirely proper (see Argument II, *infra*), appellant's proposition is totally incorrect. For it is clear that the issue, as framed by the Supreme Court in *St. Amant* v. *Thompson, supra,* is AP's

knowledge at the time it published the story, not what it may or may not have known or done thereafter. This was originally indicated in *New York Times* v. *Sullivan, supra,* where the Court found that a subsequent statement by an officer of the *Times* did not indicate "malice at the time of the publication", 376 U.S. at 286, and it has recently been reaffirmed in *Rosenbloom* v. *Metromedia, supra,* where the court found that an event which occurred after certain libelous radio broadcasts were made had "no probative value insofar as it bears on petitioner's case as to the [previous] series of broadcasts". 29 L ed 2d at 318.

Moreover, the authorities that appellant purports to cite in support of this contention (*Liquid Veneer Corp.* v. *Smuckler,* 90 F. 2d 196 (9th Cir. 1937); *Washington Annapolis Hotel Co.* v. *Riddle,* 83 U.S. App. D.C. 288, 177 F. 2d 732 (1948), etc.) are completely inapposite. These authorities relate to the common law concept of malice, i.e., ill-will, spite or intent to harm where post-publication conduct may conceivably be relevant. But the Supreme Court has repeatedly made clear, most recently in *Greenbelt Cooperative Publishing Association* v. *Bresler,* 398 U.S. 6 (1970), that the common law concept of malice is not relevant to the First Amendment concept of malice. Clearly, it is the latter concept, and not the former, which is applicable in this case. Thus, the Court in the *Greenbelt* case, after determining that plaintiff (Bresler) was a public figure stated:

> "In his charge to the members of the jury, the trial judge repeatedly instructed them that Bresler could recover if the petitioners' publications had been made with malice *or* with reckless disregard of whether they were true or false . . . . The judge then defined 'malice' to include 'spite, hostility, or deliberate intention of harm'. Moreover, he instructed the jury that 'malice' could be found from the 'language' of the publication itself. Thus the jury was permitted to

> find liability merely on the basis of falsehood and general hostility.
>
> This was error of constitutional magnitude, as our decisions have made clear." 398 U.S. at 9-10.[4]

See also, Beckley Newspapers Corp. v. *Hanks,* 389 U.S. 81, 82 (1967); *Henry* v. *Collins,* 380 U.S. 356, 357 (1965); *Washington Post Co.* v. *Keogh, supra,* 125 U.S. App. D.C. at 35, 365 F. 2d at 967. Thus, what AP did or did not do subsequent to publication is simply irrelevant to the Constitutional standard of malice.

Appellant's second contention is that recklessness can be found because the erroneous statement gave "the clearest warning on its face of prospective harm through falsity". (App't Br. 24). However, this court has expressly refuted that argument:

> "[T]he seriousness of a charge, in itself, is not probative of recklessness with respect to the truth. The most serious charges, which if anything we have the most reason to avoid deterring, may be made responsibly, with no hint of anything contrary to common knowledge, while less serious charges may be made rashly, with internal inconsistencies, citing facts contrary to common knowledge." *Washington Post Co.* v. *Keogh, supra,* 125 U.S. App. D.C. at 37, 365 F. 2d at 970.

Moreover, the story gave no warning to either Mr. Arndt or Mr. Donahue, for the remainder of the AP story, and the remainder of the *Baltimore Sun* story, concerned Dr. Waskow's confrontation with his draft board, including his description of the war as "unconstitutional, illegal, immoral and obscene", his call to the draft board to resign, and his turning in of his draft card while taking part in a war demonstration in Washington. (JA 62-63). All

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[4] Indeed, appellant himself appears to recognize this error in the first full paragraph on page 26 of his Brief.

of these matters were entirely consistent with Dr. Waskow's being a defendant in the "*Spock* case," *supra.*

Appellant next argues that recklessness is present because the erroneous matter was not "hot news" in that it was an "incidental" portion of the story. (App't. Br. 24). But *Curtis Publishing Company* v. *Butts,* (also deciding *Associated Press* v. *Walker*), *supra,* makes it clear that whether or not a story is "hot news" depends only upon whether or not the story itself needed prompt circulation to remain timely, and not whether a part of the story was essential or non-essential to the story as a whole. *See* 388 U.S. at 157-59. Further, the Court in *Butts* found that the story as a whole about General Walker involved an "important public interest in being informed about the events and personalities involved in the Mississippi riot." 388 U.S. at 146. Likewise, in the present case, the story concerning Dr. Waskow involves an "important public interest" in being informed of anti-war activities. Thus, looking at the "factual context" (App't. Br. 24) of the story in issue, it was certainly "hot news".[5]

The appellant's final contention appears to be that simply because the *Baltimore Sun* article was accurate and Mr. Arndt drew his story from that *Baltimore Sun* article, therefore, *ipso facto,* Mr. Arndt must have in fact had serious doubts as to the truth of the AP story. (App't. Br. 24-25). This contention is equally specious.[6]

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[5] Further, as to the relevancy of the "*Spock* case", *supra,* it should be noted that Dr. Waskow in his own press release concerning his prospective draft board confrontation stressed his associations with Dr. Spock and Rev. Coffin. (JA 113-14).

[6] Appellant apparently seeks to support this argument by implying that a different test for recklessness is used in cases involving comment as opposed to cases involving errors of fact. This is simply not correct. *New York Times* v. *Sullivan, supra; St. Amant* v. *Thompson, supra;* and *Rosenbloom* v. *Metromedia, supra,* all involved factual errors and, obviously, all applied—and indeed formulated—the test set forth above, namely, knowing falsity or in fact entertaining serious doubts as to the truth of the story as written. That

It is completely clear that the only reasonable explanation of what occurred is that which is set forth in Mr. Arndt's affidavit, namely, that he made a simple mistake. A reading of the pertinent part of the *Baltimore Sun* article (quoted *supra* at p. 5) makes abundantly clear how Mr. Arndt could have reached the erroneous conclusion that he did. Thus, at the very most, Mr. Arndt's actions may have constituted negligence. But the Supreme Court has made it clear that a finding of negligence is "constitutionally insufficient to show the recklessness that is required for a finding of actual malice", *New York Times* v. *Sullivan, supra,* 376 U.S. at 288. The underlying reason for the Court's holding in this respect was its conclusion that:

> "[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive . . .' [citation omitted]." 376 U.S. at 271-72.

See also, Garrison v. *Louisiana, supra,* 379 U.S. at 75 ("honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech."); *St. Amant* v. *Thompson, supra,* 390 U.S. at 732 ("[T]o ensure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.").

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same test was applied in the post-*New York Times* cases cited by appellant as "fair comment" cases, i.e. *Garrison* v. *Louisiana, supra,* and *Time, Inc.* v. *Pape,* 401 U.S. 279 (1971). (It should be noted that the *Pape* case, in addition, clearly involved an error of fact—i.e., the omission of the word "alleged" in the publication of an article concerning an official report). The other two cases cited by appellant (*DeSavitsch* v. *Patterson,* 81 U.S. App. D.C. 358, 159 F. 2d 15 (1946) and *Washington Times Co.* v. *Bonner,* 66 U.S. App. D.C. 280, 86 F. 2d 836 (1936)) are pre-*New York Times* cases involving the common law privilege of fair comment and thus are irrelevant. Moreover, Prosser, also cited by appellant, recognizes that *New York Times* v. *Sullivan* removed in cases covered by the *New York Times* rule the previous distinction courts had drawn between errors of fact and opinion. Prosser, *The Law of Torts* 815 (3rd ed. 1964).

In sum, it is submitted that Judge Bryant was clearly correct in finding that the evidence was "overwhelming" that the erroneous article resulted from "human mistake" and that AP "entertained no serious doubts as to the truth of [the] publication" when it was dispatched (JA 90), and in thus determining that summary judgment should be granted in favor of AP.[7]

II

THE TRIAL COURT PROPERLY REFUSED TO CREATE A NEW TORT INVOLVING A DETERMINATION OF THE ADEQUACY OF THE CORRECTIVE MEASURES TAKEN BY THE APPELLEES.

Appellant, apparently recognizing that the applicable line of Supreme Court cases (discussed in Argument I, *supra*) imposes no liability on AP and the Star for the publication of the subject story, urges instead the "creation" of a "new tort," which he describes as "willfully refusing to make a good faith effort to correct." (App't. Br. 26).

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[7] The correctness of Judge Bryant's determination has been further confirmed by the subsequent Supreme Court decision in *Time, Inc.* v. *Pape, supra*, in which a magazine was sued for the erroneous republication of a portion of an official government report. Rather than noting that certain civil rights violations were merely *alleged*, as stated in the official report, the magazine article omitted the word "alleged" and thus made it appear that the acts complained of had actually occurred. Unlike the present case, both the researcher and author of the article were aware of the presence of the word "alleged" in the official report and the researcher knew that the word had been omitted from the final article as published by the magazine but "said she believed the article to have been true as written." 401 U.S. at 283. The Supreme Court found no "falsification" in the omission that would itself be enough to sustain a jury verdict of "actual malice" and reinstated the directed verdict of the District Court. 401 U.S. at 289. Thus, if "actual malice" was not found in *Time, Inc.* v. *Pape* because of a belief in the truth of the article "as written" where the defendant knew that an alteration of the original article had occurred in the republication, then *a fortiori* an unknown error should likewise not be enough to sustain a jury verdict of "actual malice".

Apart from the fact that there is no justification for such a tort, appellant's argument (App't. Br. 26-34) totally ignores the fact that corrective actions were taken by both AP and the Star and were taken voluntarily before any request therefor was received from the appellant.

Specifically, with respect to AP, within hours after receiving notice that an error had been made, the Baltimore Bureau of AP issued on its local wire a corrective story (JA 65), accompanied by a request to those newspapers which printed the original story to print the correction. (JA 42). It also brought the error to the attention of the AP's General Desk in New York which on the same day issued over the two other wires on which the original story had been carried, and to all AP Bureaus, a corrective story (JA 66) accompanied by a request that the same be printed by any newspaper which had printed the original story. (JA 50, 52). These actions complied fully with AP's regular procedures with respect to correction of an error. (JA 52).

It was not until three days later that appellant, through his attorney, wrote a letter to AP demanding that a correction be issued and also demanding that AP furnish proof that every newspaper and other news media that published the story had published a correction. (JA 76). After being informed by AP that a correction had already been issued (JA 77), appellant made no complaint concerning the correction itself but rather insisted that either AP ensure that corrections were published by all media that published the story or that information on who received the story be turned over to him so that he could pursue the media in this regard. (JA 79). AP's attorney then responded, in pertinent part:

> "I indicated that it was literally (and legally) impossible for the Associated Press to require its users to carry the correction, and that it would be difficult, if not impossible to determine which members of the

news media carried the original story. Suffice to say that all who received the September 13th story received the correction and request on September 14th.

"If you recall, I invited you to call me when you learned of any news media which carried the original story without a correction.

"Under the circumstances I feel that The Associated Press has done everything that could reasonably be expected of it." (JA 79-80).

The above facts make clear that appellant is seeking to use a belated exchange of correspondence between two attorneys as the basis for a "new tort". If his proposition were accepted, it would constitute the creation of a self-engineered and "lawyer-made" tort in its most egregious form. The above facts also make clear that appellant is not seeking the creation of a tort with respect to refusal to issue a correction, since clearly a correction was issued by AP. Rather, he is seeking to establish a tort whereby after a correction is issued, judges and juries will undertake an appraisal of the adequacy of the publisher's corrective actions. And, indeed, this is to be done with respect to the corrective actions taken on an error that has been given constitutional protection under the rule of *New York Times* v. *Sullivan, supra.*[8]

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[8] Appellant seeks support for his proposal on the basis of irrelevant or misinterpreted "authorities". He first points to a letter written by a partner of the "counsel for the AP" in an entirely unrelated matter, an article by a syndicated columnist, and an editorial in a local newspaper. None of these "sources" called for the adoption of the tort here proposed by appellant or indeed of any tort at all. Further, none of them are parties to this litigation, but rather, per *Washington Post Co.* v. *Keogh, supra,* 125 U.S. App. D.C. at 37 n. 6, 365 F. 2d at 970 n. 6, are simply "individuals stating their own positions". Appellant next seeks to rely on *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969), which is equally inapposite. The Supreme Court in that case nowhere speaks of tort liability and the case simply relates to the FCC's fairness doctrine. (*See also, Yablonski* v. *United Mine Workers of America,* 305 F. Supp. 868, 872 (D.C.D.C. 1969) holding the *Red Lion* case inapplicable to a union newspaper). Finally, appellant contends that a footnote in *Rosenbloom* v. *Metromedia, supra,* gives "express sanction to the idea of tort liability for failure to publish an appropriate retraction." (App't. Br. 30). Aside from the fact that appellant's conten-

Such a tort would create total confusion. A publisher, as here, could disseminate a correction in good faith and believe that he had taken all reasonable steps but then be subjected to burdensome and extended litigation under which his judgment in this regard would be challenged in court and re-evaluated by a jury. Not only would such a doctrine create a "chilling effect" that would be in clear violation of the First Amendment, cf. *Dombrowski* v. *Pfister,* 380 U.S. 479, 487 (1965), but it would also severely undercut the doctrine established in the *New York Times* case and succeeding cases, namely, that if freedoms of expression are to have the "breathing space" needed to survive, "inevitable" erroneous statements must be protected and not allowed to become the basis for liability. 376 U.S. at 271-72; *see also Garrison* v. *Louisiana, supra,* 379 U.S. at 74-75; *St. Amant* v. *Thompson, supra,* 390 U.S. at 732; *Time, Inc.* v. *Pape, supra,* 401 U.S. at 290-92; *Ocala Star-Banner Co.* v. *Damron,* 401 U.S. 295, 301 (1971) (Mr. J. White, concurring). For, if publishers are in fact to have the "breathing space" which they are guaranteed by the Constitution, then they must be free from the fear that an inadvertent error followed by a good faith correction may nevertheless result in extended litigation and possible judgment against them. Indeed, such a doctrine would fly in the face of the insistence of this court that "harassment" in the First Amendment

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tion is inapplicable to the facts of this case, since AP published an appropriate retraction, it is also a misinterpretation of what the Court was saying. For the statement of the Court to which this footnote relates is:

> "If the States feel that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond *rather than in stifling public discussion of matters of public concern.*" 29 L ed. 2d at 314. (Emphasis supplied.)

Thus, the Court is clearly not referring to tort liability such as proposed by appellant which, perforce, would "stifl[e] public discussion of matters of public concern", but rather about the need for access to news coverage by individuals and groups who do not generally receive it. Clearly, this is not an "access" case for, as the record in this case shows, appellant has sought and received substantial and continuing press coverage. (*See,* e.g., JA 43, 118-61).

area through "long and expensive litigation productive of nothing" cannot be tolerated, *Washington Post Co.* v. *Keogh, supra*, 125 U.S. App. D.C. at 35, 365 F. 2d at 968, that "the very pendency of a libel action may cut across the public interest in free and untrammeled speech on public issues", *Thompson* v. *Evening Star Newspaper Co., supra*, 129 U.S. App. D.C. at 301, 394 F. 2d at 776, and that the *New York Times* rule "sought to make secure [the freedom of the press] in areas of public concern", *Wasserman* v. *Time, Inc., supra*, 138 U.S. App. D.C. at 10, 424 F. 2d at 923.

In sum, the proposed new tort would be a serious undercutting of the First Amendment rights of the press that have been so clearly enunciated by the Supreme Court and this court in *New York Times* v. *Sullivan* and succeeding cases. Moreover, it is submitted that the trial court's conclusions were clearly correct when it determined that "even if this Court were to depart from the generally recognized principle that the issuance of a retraction is not required to prevent liability from attaching, the plaintiff could still not complain about the actions of the defendants in this case", and that AP's corrective stories were "certainly adequate under the circumstances." (JA 90).

CONCLUSION

For the foregoing reasons it is submitted that this court should affirm the trial court's grant of summary judgment as to appellee AP.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

ARTHUR I. WASKOW

Plaintiff-Appellant,

v.

THE ASSOCIATED PRESS

and

THE EVENING STAR NEWSPAPER COMPANY,

Appellees.

No. 71-1109

PETITION FOR REHEARING

This case was decided on March 23, 1972, in a Per Curiam opinion that affirmed summary judgment for Defendants. The Court did not hear oral argument. Appellant respectfully petitions for rehearing for two reasons.

I

After acknowledging that it had published a statement about Dr. Waskow that was a "bold-face error," [1] and clearly libelous prior to

1. Brief for Evening Star Newspaper Co., p. 14.

N.Y. Times v. Sullivan, Defendant Star subsequently republished the libel. Thus, knowledge of the truth is not even at issue with respect to the republication.

In holding that Dr. Waskow is not entitled to a jury on this aspect of the case, the Court relied on the assumption that the republication was not "outside the normal channels" of distribution. Slip Opin. at p. 7 (emphasis in the original). This essential premise of the opinion is directly contradicted, however, in Admissions filed below by the Star itself. Asked to admit only that the Star "continued to make /the report/ available to the public" after having knowledge of the truth (R. 22), the Star answered "Yes," and then volunteered the additional statement:

> "but not through usual distribution sources." (R. 25) (emphasis added)

Thus, on the very test formulated by the Court,[2] it is evident that there was indeed a republication or redistribution "for purposes of the Times rule." A holding against Appellant, therefore, could only be achieved by reading out of the Record the Star's formal Admission, and replacing it with counsels' own unverified and unsupported quote in their Brief. This would be grossly unfair to Appellant, and would indeed make a mockery of both pretrial discovery and summary judgment procedures.

II

The decision of the Supreme Court in Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 91 S. Ct. 628 (1971), is not referred to in the Court's opinion. As pointed out in the Brief for Appellant (pp. 13-14), the facts of Ocala

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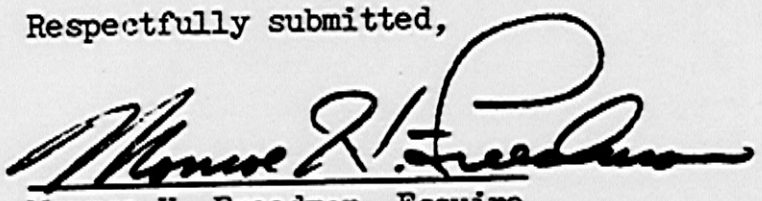
2. The Court held: "... for purposes of the Times rule, a daily newspaper is 'published' only once -- when it is printed and placed in the distribution system -- unless it is redistributed outside the normal channels ...." Slip Opinion at p. 7.

regarding malice or reckless disregard are far less compelling than those of this case. Yet the Supreme Court remanded Ocala for a new trial.

The oversight in this regard apparently stems from an ambiguity in Appellant's Brief, because counsel for Defendant Star were similarly confused about Appellant's discussion of Ocala and, particularly, about the significance of the dissents in that case.[3] The point is, of course, that the two dissenting judges explicitly objected to the fact that the majority "would permit these libel cases to be tried again." 91 S. Ct. at p. 642. Thus, the majority of the Supreme Court, beyond question, was recognizing the appropriateness of a jury trial on the facts of Ocala and, a fortiori, on the facts of this case.

Accordingly, Appellant respectfully petitions for rehearing of the case.

Respectfully submitted,



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Telephone 676-6772

Attorney for Appellant

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3. Counsel for Defendant Star wrote: "The two dissenting justices were not, as plaintiff implies, in favor of affirming the judgment below." Brief for Appellant Star at p. 18 (emphasis in the original). Plaintiff did not intend such an implication.

CERTIFICATE OF SERVICE

A copy of the foregoing Petition for Rehearing was served by mail on counsel for Appellees on

Monroe H. Freedman, Esquire